LIBRARY.
SUPREME COURT, U. S.

FILED
JAN 22 1970
JOHN F. DAVIS, CLERK

APPENDIX

SUPREME COURT OF THE UNITED STATES

October Term, [redacted] 1970

No. [redacted] 41

CHARLES BATCHELOR, Chief of Police,
City of Dallas, et al.

Appellants

against

BRENT STEIN,

Appellee

Appeal from the United States District Court for the Northern District of Texas

---

Filed September 8, 1969

Probable Jurisdiction Noted December 8, 1969

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1969

No. 565

CHARLES BATCHELOR, Chief of Police,
City of Dallas, et al.

Appellants

against

BRENT STEIN,

Appellee

Appeal from the United States District Court for the Northern District of Texas

---

INDEX

	Page
Chronological List of Relevant Docket Entries	iii
Plaintiffs Complaint with attached Exhibits A and B, filed January 14, 1969	1
Motion to Dismiss Complaint, filed by Defendant Henry Wade on Jan. 27, 1969	20
Motion to Dismiss Complaint filed by Defendants, Charles Batchelor, T. C. Snider, V. D. Monaghan and R. D. Rodgers on Jan. 30, 1969	23

Page

Supplemental Motion to Dismiss, filed by Defendants Charles Batchelor, T. C. Snider, V. D. Monaghan and R. D. Rodgers 27

Plaintiff's First Amended Complaint, filed March 10, 1969 30

Response By the State of Texas in the nature of amicus curiae, filed March 20, 1969 39

Motion by the State of Texas to Consider Response in Amicus Curiae, filed Mar. 20, 1969 54

Plaintiff's Motion for Summary Judgment with attached affidavit of Brent Steif on April 1, 1969 56

Excerpts from Deposition of Truman C. Snider, filed April 21, 1969 61

Excerpts from Deposition of Verlon Dean Monaghen, filed April 21, 1969 72

Order Designating a Three-Judge Court, filed April 3, 1969 75

Plaintiff's Motion to Amend Pleadings, filed May 23, 1969 77

Opinion of Three-Judge Court, filed June 9, 1969 79

Final Judgment of the Three-Judge Court, filed June 24, 1969 93

CHRONOLOGICAL LIST OF RELEVANT DOCKET ENTRIES

Jan. 14, 1969	Filed COMPLAINT and issued SUMMONSES (5).
Jan. 27, 1969	Filed by Henry Wade, MOTION TO DISMISS COMPLAINT.
Jan. 31, 1969	Filed by Defendants, Charles Batchelor, T. C. Snider, V. D. Monaghan and R. D. Rodgers, MOTION TO DISMISS for lack of jurisdiction, for failure to state a claim and as a matter of judicial discretion in the public interest.
Feb. 6, 1969	Filed SUPPLEMENTAL MOTION TO DISMISS by defts., Batchelor, Snider, Monaghan and Rodgers.
Feb. 11, 1969	Filed Ptlf's MOTION TO TAKE DEPOSITIONS of Officers T. C. Snides, V. D. Monaghan, & R. D. Rodgers.
Mar. 10, 1969	Filed FIRST AMENDED COMPLAINT.
Mar. 20, 1969	Filed ANSWER OF the State of Texas.
Mar. 20, 1969	Filed by State of Texas, MOTION to consider response in amicus curiae.
Apr. 1, 1969	Filed Pltf's MOTION FOR SUMMARY JUDGMENT with attached affidavit of Brent Stein.
Apr. 8, 1969	Filed ORDER designating two additional judges for 3 judge court. JRB.
Apr. 21, 1969	Filed DEPOSITIONS OF Truman C. Snider, R. D. Rodgers and Verlan Dean Monaghen.

May 12, 1969	Filed BRIEF of State of Texas and motion to dismiss.
May 28, 1969	Filed plaintiff's MOTION TO AMEND complaint.
June 9, 1969	Filed OPINION of the 3 judge court.
June 27, 1969	Filed FINAL JUDGMENT as to part of plaintiff's claims, Sec. 1 of Art. 527 of the Texas Penal Code is declared unconstitutional, definition of obscene as set forth in Sec. 3 is unconstitutional. Defendants are permanently enjoined from future enforcement of Sections 1 and 2 of Art. 527 of Texas Penal Code, Acts of 1961, 57th Legislature. All claims not herein determined are reserved for determination by a single judge of this court. (Judges ILG: STH: HOW). Copy of judgment mailed to attorneys of record.

(Filed Jan. 14, 1969)

UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION

CIVIL ACTION NO. CA 3-2951-B

BRENT STEIN

vs.

CHARLES BATCHELOR, Chief of Police, City of Dallas; T. C. SNIDER, V. D. MONAGHAN, R. D. RODGERS, HENRY WADE, District Attorney, Dallas County

COMPLAINT

TO THE HONORABLE JUDGE OF SAID COURT:

1.

This action arises under the first, fourth, fifth, sixth, ninth, and fourteenth amendments of the Constitution of the United States and under §§1983 and 1985(2) of Title 42 of the United States Code. Jurisdiction is conferred upon this court by the provisions of §1343 (3) (4) of Title 28 of the United States Code. Plaintiff by this action seeks the equitable and legal remedies provided by 28 U.S.C. §1343 and declaratory relief under 28 U.S.C. §2201.

2.

The plaintiff is Brent Stein, a resident of Dallas

County, suing on his own behalf and on behalf of a class of persons similarly situated, pursuant to Rule 23 of the Federal Rules of Civil Procedure. Brent Stein is the publisher of newspaper known as the "Dallas Notes." The class which he represents is composed of present and future employees of and contributors to the "Dallas Notes," a class too numerous to make if practicable to bring them all before the court. The claim of the Plaintiff is typical of the claim of the class and there are questions of law and fact common to the class and your plaintiff will fairly and adequately protect the interests of the class. Parties opposing the plaintiff and the class have acted on grounds generally applicable to the class thereby making final injunctive relief or declaratory relief appropriate with respect to the class as a whole.

3.

The defendants are Charles Batchelor, Chief of Police, City of Dallas, Texas, T. C. Snider, V. D. Monaghan, and R. D. Rodgers, all members of the Dallas Police Department, and Henry Wade, District Attorney of Dalla's County, all of whom are sued in their official capacities, relief is sought as to them and to their successors in office.

4.

The nature of this cause is that your plaintiff has been, is being, and will continue to to (sic) be deprived by the Dallas Police acting under color of law of rights, privileges and immunities guaranteed him by the Constitution of the United States, and specifically rights of freedom of speech, freedom of press, and freedom from unreasonable searches and seizures

as those rights are protected from invasion by the state by the 14th Amendment to the United States Constitution. Further, your plaintiff is currently being prosecuted, and fears future prosecution, by the defendant, Henry Wade, District Attorney of Dallas County, under a state statute, to wit, Article 527 of the Penal Code of the State of Texas. Prosecution under said statute deprives plaintiff of rights protected by the 1st, 4th, 5th, 6th, 9th and 14th Amendments to the United States Constitution.

5.

The "Dallas Notes" is a newspaper published twice monthly in Dallas County for general distribution to the public. It has been published, sold and distributed by your plaintiff Stein, and his predecessors for a period ofsome two years on a regular basis. The "Dallas Notes" is a member of what has come to be called the "Underground Press" and although unlike the conventional daily press, the "Dallas Notes" is nevertheless, an expression of a point of view, political and social, fully entitled to the indulgence of the constitutional protections of freedom of the press and freedom of speech. The content of the "Dallas Notes" is predominantly political containing however, other commentary on cultural and entertainment attractions. It affords a vehicle for the expression of personal opinions, predominantly from those who do not have access to the conventional media.

6.

Members of the Dallas Police have demonstrated over a period of time increasing hostility to the existence of the "Dallas Notes" and to the persons respon-

sible for its publication and distribution. This hostility has been manifested in unlawful surveillance of the location at which the "Dallas Notes" is published, and unlawful harassment of person distributing the paper.

7.

More specifically, plaintiff Stein, was illegally detained and his car searched without justifiable cause in September of 1968 by members of the Dallas Police Department who indicated they knew Stein and who conceded at the time that they had no basis for the arrest and search.

8.

Further, on October 30, 1968 your defendants, Snider and Monaghan, along with numerous other Dallas policemen, under the supervision and control of the defendant Batchelor obtained a warrant to search the premises at 3117 Live Oak in the City of Dallas, these premises included the residence of Stein and the situs for the preparation and distribution of the "Dallas Notes." This warrant was obtained and executed in violation of the Constitutional guarantees contained in the 1st, 4th, 5th, 6th, 9th, and 14th Amendments to the Constitution. (Copies of the Affidavit in support of the warrant and warrant are attached as Exhibit A.) In the execution of the warrant, the police officers seized not only alleged obscene photographs, but newspapers, a photograph enlarger, two portable typewriters, two electric typewriters, one camera, and certain amount of money, all of which related to the publication of the "Dallas Notes." The seizure of these articles had as its only purpose interference with publication of the "Dallas Notes" and was without just

or proper cause. At the time of the unlawful search and seizure of October 30th, Dallas Police arrested the plaintiff Stein, as well as other persons temporarily residing at the premises, which arrests were unlawful, and were intended to, and did have, the effect of discouraging persons from associating with, contributing to or assisting in the publication of the "Dallas Notes."

9.

Following the unlawful seizure of October 30, 1968, plaintiff Stein made arrangements to secure new equipment essential to the publication of the "Dallas Notes" and resumed publication. However, on November 15, 1968, representatives of the Dallas Police Department again obtained a search warrant to search the residence of Mr. Stein and the home of the "Dallas Notes," this warrant too was obtained and executed in violation of the guarantees of the 1st, 4th, 5th, 6th, 9th and 14th Amendments of the Constitution. (The warrant and affidavit are attached hereto as Exhibit B.)

This warrant purported to seek marijuana alleged to be on the premises. No marijuana was indeed found, however, on this occasion the Dallas Police unlawfully seized three cameras, one safety light, one lamp, one desk containing printing supplies, five card board boxes containing personal records and documents, two telephones, typewriters, and other property of the plaintiff Stein used in the publication of the "Dallas Notes." The seizure of this material was again for the sole purpose of inhibiting the publication of the "Dallas Notes" and was without justifiable cause and contravened the Constitutional rights of your plaintiff.

10.

Plaintiff has made oral and written demand for the return of the aforesaid property from the Dallas Police, but the Dallas Police continue to hold the property, which they unlawfully seized. Plaintiff has reason to believe that until injunctive relief issue requiring the return of the aforesaid property, that Dallas Police will refuse to return it to its rightful owner and further, unless restrained from future depredations of the type indicated, the Dallas Police will engage in further unlawful searches and seizures for the sole purpose of attempting to prevent the publication and distribution of the "Dallas Notes" all in violation of the Constitutional rights of the plaintiff and the class which he represents.

11.

In addition, representatives of Dallas Police unknown to plaintiff, have engaged in other unlawful acts, including interfering with contractual arrangements of the "Dallas Notes"; for the sole purpose of interfering with and impeding the publication of the "Dallas Notes."

12.

The aforesaid actions of the Dallas Police have not been undertaken in good faith but rather for the purpose of suppressing political dissent and inhibiting plaintiff and others the exercise of their Constitutional rights.

13.

The conduct on the part of the Dallas Police is part of a conspiracy having as its object prohibiting the

expression of ideas that are alien to the defendants, and having as its ultimate goal the abolition of the "Dallas Notes," all in violation of the Constitutional rights of the plaintiff and the class he represents.

14.

Plaintiff alleges that he is entitled to a preliminary injunction requiring the Dallas Police to return forwith all property seized during the unlawful raids of October 30, 1968, and November 15, 1968, and to cease any future unlawful searches and seizures with respect to plaintiff. This property is necessary to the continued publication of the "Dallas Notes" and absent prompt injunctive relief, plaintiff will suffer irreparable damage for which there is no adequate remedy at law. Plaintiff is entitled to a preliminary injunction as prayed, and upon final hearing, a permanent injunction against defendant Batchelor, and his successors, requiring them to cease and desist from the unlawful harassment of plaintiff and requiring defendant Batchelor, and his successors, to issue affirmative instructions to his subordinates to cease unlawful surveillance, unlawful arrests, unlawful searches and seizures, and other conduct directed at plaintiff and the class he represents, calculated to interfere with the publication and distribution of the "Dallas Notes."

15.

With respect to the defendant Henry Wade, the District Attorney of Dallas County, there are currently pending against the plaintiff two criminal misdemeanor cases in the County Criminal Courts of Dallas County being criminal causes 68-2549 and 68-3977C, charging plaintiff with violation of the obscenity stat-

ute of the State of Texas being Article 527 of the Texas Penal Code. In connection with these pending prosecutions your plaintiff alleges that the prosecutions are based upon property taken by unlawful search and seizure in violation of the 1st, 4th, 5th, 6th, 9th, and 14th Amendments of the Constitution, and further said statute under which the state proceeding is unconstitutional on its face, and is unconstitutional as attempted to be applied to plaintiff. Thus, plaintiff is entitled to injunctive relief against further prosecution of these criminal causes, and is entitled to further injunctive relief against any future prosecution of the plaintiff or any other persons in the class he represents under Article 527 of the Texas Penal Code.

16.

In addition, your plaintiff seeks declaratory relief under 28 U.S.C. §2201 determining the application of the provisions of Article 527 of the Texas Penal Code to the plaintiff and to "Dallas Notes," praying Court take jurisdiction of the cause and pursuant to the provisions of §2201 declare that Article 527 of the Texas Penal Code may not be constitutionally applied to the "Dallas Notes" for the reason that such application of the statute to the "Dallas Notes" would be an unconstitutional intrusion upon rights protected by the First Amendment to the Constitution, and for the further reason that Article 527 excludes from its coverage daily and weekly newspapers and thus, to uphold this exclusion and deny a similar exclusion to the "Dallas Notes," which is a bi-monthly newspaper, constitutes an arbitrary and improper classification in violation of the equal protection and due process protections of the Fourteenth Amendment of the Constitution.

WHEREFORE, premises considered, your Plaintiff respectfully prays:

(A) That this court take jurisdiction of the cause, and determine that this is a proper class action;

(B) That after notice, plaintiff be granted preliminary relief against the defendant Batchelor, and the Dallas Police Department, as described above;

(C) That upon final hearing, the Court grant the permanent injunctive relief against all defendants as described above;

(D) That the Court adjudge, decree and declare the rights of the parties with respect to the application of Article 527 of the Texas Penal Code;

(E) That the Court grant such other and further relief as is just and equitable.

Respectfully submitted,

s/ David R. Richards
1601 National Bankers Life Building
Dallas, Texas 75201

EXHIBIT A TO COMPLAINT

Complaint—Affidavit for Search Warrant for Obscene Articles and Materials.

THE STATE OF TEXAS
COUNTY OF DALLAS

(WE)

T. C. Snider and V. D. Monaghen do solemnly swear that heretofore, on or about the 30th day of October

A.D., 1968, in said County and State One Brent Stein and persons unknown to affiants at this time did then and there unlawfully possess obscecne articles and materials, to-wit: pictures, photographs, drawings and obscene literature and we have cause to believe and do believe that said obscene articles and materials are now concealed by Brett Stein and persons unknown to affiants at this time.

in a two-story brownish brick residence, trimmed in white, with a write roof, situated in Dallas County, Texas, 3117 Live Oak Street, in the City of Dallas, Texas, which said Brett Stein and persons unknown to affiants at this time occupies, possesses, controls and has charge of.

MY BELIEF AS AFORESAID IS BASED ON THE FOLLOWING FACTS:

(A) We have been informed of the existence of the foregoing set out facts by reliable, credible and trustworthy citizens of Dallas, Dallas County, Texas,

(B) and further that Brett Stein is the publisher of twice monthly newspaper, Dallas Notes of the Underground. That Brett Stein uses the name Stoney Burns in referring to himself in this newspaper. That Volume II number 15 of Dallas Notes of the Underground dated October 16-November 5, 1968, contained pictures of male persons fondling on thy breasts of female persons. That this newspaper contained obscene four (4) letter words. That this edition of this newspaper was purchased by a 13 year old girl from a peddler on the street near the Memorial Auditorium. That affiants have received information in the past 24 hours from reliable, credible and Trustworthy person that Brett Stein and persons unknown to affiants at this time are now in possession of lewd and obscene pictures, photographs, drawings and obscene literature.

WHEREFORE, (We) ask that a warrant to search for and seize the said obscene articles and material be forwith issued in accordance with the law in such cases provided.

/s/ T. C. SNIDER

/s/ V. D. MONAGHAN

Sworn to and subscribed before me by V. D. Monaghan and T. C. Snider on this the 30 day of Oct., A.D., 1968.

/s/ TOM NAYLOR
Justice of the Peace, Precinct No. -- Place -- Dallas County, Texas.

Search Warrant for Obscene Articles and Materials

THE STATE OF TEXAS
COUNTY OF DALLAS

To the Sheriff or any Peace Officer of Dallas County, Said State, GREETINGS:

WHEREAS, complaint in writing, under oath, has been made before me by T. C. Snider and V. D. Monaghen (which complaint is hereto attached and expressly made a part hereof) alleging that on or about the 30th day of October, A.D. 1968, in said County and State, one Brett Stein and persons unknown to affiants at this time did then and there unlawfully possess obscene articles and materials, to-wit: pictures, photographs, drawings and obseene literature,

and whereas, in said complaint, the said T. C. Snider and V. D. Mongahen further says that they have cause to believe and do believe that the said obscene articles and materials, to-wit: pictures, photographs, drawings and obscene literature, are now concealed by Brett Stein and persons unknown to affiants at this time in a two-story brownish brick residence, trimmed in white,

with a white roof, situated in Dallas County, Texas, at 3117 Live Oak Street, in the City of Dallas, Texas which said Brett Stein and person unknown to affiants at this time occupies, possesses, controls and has charge of.

AND said complaint having stated facts and information in my opinion sufficient to establish probable cause for the issuance of this warrant

YOU ARE THEREFORE COMMANDED TO FORWITH SEARCH THE PLACE ABOVE NAMED AND DESCRIBED WHERE SAID OBSCENE ARTICLES AND MATERIAL, TO-WIT:

are alleged to be concealed, and if you find such obscene articles and materials or any portion thereof, you will seize the same and bring it before me at my office, situated at Courthouse in the City of Dallas, in Dallas County, Texas, in said County on the 2 day of November, A.D., 1968.

AND you will also arrest and bring before me, at said place and time, the said accused of the possession of said obscene articles and materials, to-wit:

HEREIN FAIL NOT, AND DUE RETURN MAKE HEREOF TO BE AT THE TIME AND PLACE ABOVE NAMED.

WITNESS my signature on this the 30 day of October, A.D. 1968.

/s/ TOM NAYLOR
Justice of the Peace, Precinct No. 1 Place 2 Dallas County, Texas

30 October 1968
at 9:10 p.m.

OFFICER'S RETURN

Came to hand on the 30th day of October, A.D. 1968 at 9:10 o'clock P.M., and executed on the 30th day of

October, A.D. 1968 at 10:20 o'clock P.M., by seizing and taking the following described property:

A large quantity of newspapers (Dallas Notes)
1 photograph enlarger
2 portable typewriters
2 electric typewriters
1 camera
Numerous obscene photographs
$5.43 in money

Which said property was found by us at the place designated and described in the warrant and we also at the same time, arrested:
Brent LaSalle Stein, w/m/25
Robert Everett Delaney w/m/22
Patricia Lynn Bowden w/f/18
Cathy Ann McNarin w/f/18
Donna Maria Delaney w/f/22
James Franklin McDowell, Jr. w/m/21

in obedience to the comand of said warrant.

/s/ R. C. SNIDER

/s/ V. D. MONAGHAN

Returned and Filed Nov. 6 2:13 P.M. '68, Tom Naylor, Jr.

STATE OF TEXAS
COUNTY OF DALLAS

Subscribed and sworn to before me, a Notary Public in and for Dallas County, Texas, this the 1st day of November, A.D. 1968.

/s/ MARJORIE MILLER

EXHIBIT B OF COMPLAINT

SEARCH WARRANT FOR NARCOTIC DRUGS AND DANGEROUS DRUGS

STATE OF TEXAS
COUNTY OF DALLAS

To the Sheriff or Any Peace Officer of Dallas County, Texas, GREETING:

Whereas, complaint in writing under oath has been made before me by R. D. Rodgers, which complaint is hereto attached and expressly made a part hereof, alleging that on or about the 15th day of November, A.D., 1968, in the City of Dallas, Dallas County, Texas, one Brent LaSalle Stein and person unknown did then and there unlawfully possess and does at this time unlawfully possess a narcotic drug and a dangerous drug, to-wit: Marijuana and further that he has cause to believe that the said narcotic drug and dangerous drug are now concealed by Brent LaSalle Stein and persons unknown in in a house being described as a white two-story frame dwelling situated in the City of Dallas, Dallas County, Texas, located 3117 Liveoak Street which said Brent LaSalle Stein and persons unknown now possesses, occupies, controls and has charge of.

And after examining the said complaint in writing and under oath, I have determined that the said complaint does state facts and information sufficient to establish probable cause for the issuance of this warrant to search for and seize the said narcotic drug and dangerous drug in accordance with the law in such cases provided.

YOU ARE THEREFORE COMMANDED TO FORTHWITH SEARCH THE PLACE ABOVE NAMED AND DESCRIBED WHERE THE SAID NARCOTIC DRUG AND DANGEROUS DRUG, TO-WIT: Marijuana are alleged to be concealed, and if you find such narcotic drug and dangerous drug, or any portion thereof you will seize the same and bring it before me at my office, situated at _____ in the City of _____ in Dallas County, Texas, on the _____ day of _____ A.D. 19 ____.

AND, you are commanded to arrest and bring before me, at said place and time, the said: Brent LaSalle Stein and unknown persons accused of the possession of the said narcotic drug and dangerous drug.

HEREIN FAIL NOT, AND DUE RETURN MAKE HEREOF TO ME AT THE TIME AND PLACE ABOVE NAMED.

Witness my signature on this the 15th day of November, A.D. 1968; at 7:30 o'clock p.m.

/s/ W. E. RUBBING
MAGISTRATE

Justice of the Peace, Precinct No. 2, Place 1, Dallas County, Texas

OFFICER'S RETURN

Came to hand on the 15th day of November, A.D. 1968, at 7:30 o'clock P.M. and executed on the 15th day of November, A.D. 1968, at 9:30 o'clock P.M., by seizing and taking the following described property:

SEE ATTACHED LIST

which said property was found by (us) at the place designated and described in the warrant, and (we) also, at the same time, arrested:

Brent LaSalle Stein W/M/25
Charlotte Alice Barker W/F/18
Carol Marie Cundiff W/F/19
Carol Ann Brandon W/F/19
Steven Keith Clevenger W/F/19
all for Inv. Possession Obscene Material

in obedience to the command of said warrant.

/s/ R. D. Rodgers

STATE OF TEXAS
COUNTY OF DALLAS

Subscribed and sworn to before me, a Notary Public in and for Dallas County, Texas, this the 20th day of November, A.D. 1968.

/s/ Kenneth P. Wolford

Returned 11-20-68
B.D.

ITEMS CONFISCATED AT 3117 LIVE OAK STREET: ALL ITEMS USED IN CONNECTION WITH THE PRINTING OF PORNOGRAPHIC MATERIAL, TO WIT: "DALLAS NOTES." EVIDENCE PLACED IN POLICE PROPERTY ROOM, 1505 CANTON STREET.

Property room Tag #39-631:

One (1) Polaroid land camera, Swinger Model 20.
One (1) Kodak Brownie Fiesta R4 Camera
One (1) Flocon FR camera
One (1) Kodak Adjustable "Safety-light" Lamp Model "A"

Property room Tag #39-633:	One (1) Brown "Davor Floating Fixture" lamp (U.S. Government written on the base)
Property room Tag #39-633	One (1) Brown formica, 3 drawer desk, containing printer's supplies.
Property room Tag #39-634	One (1) T Square (drafting square) One (1) 24" X 36" drafting table (wooden) Two (2) wooden drawing boards One (1) Mailing tube confaining printer's paper.
Property room Tag #39-635	Five (5) cardboard boxes containing personal records, documents, newspapers, and printing supplies, also numerous additions of the newspaper "Dallas Notes." Two (2) black Bell System Telephone One (1) Swingline stapler
Property room Tag #39-636	One (1) IBM Executive Model Typewriter (electric), Serial #199431. One (1) Typewriter desk stand (wooden).

/s/ R. D. Rodgers

STATE OF TEXAS
COUNTY OF DALLAS

Subscribed and sworn to before me, a Notary Public in and for Dallas County, Texas, this the 20th day of November, A.D. 1968.

/s/ KENNETH P. WOLFORD

Complaint—Affidavit for Search Warrant for Narcotic Drugs and Dangerous Drugs

THE STATE OF TEXAS
COUNTY OF DALLAS

I, R. D. Rodgers, do solemnly swear that heretofore, on or about the 15th day of November, A.D. 1968, in the City of Dallas, Dallas County, Texas, one Brent LaSalle Stein and persons unknown did then and there unlawfully possess and does at this time unlawfully possess a narcotic drug and a dangerous drug, to-wit: Marijuana in House being described as a white two-story frame dwelling located 3117 Liveoak Street in City of Dallas, Dallas County, Texas, which said house is possessed, occupied, under the control and charge of Brent LaSalle Stein and persons unknown.

MY BELIEF OF THE AFORESAID STATEMENT IS BASED ON THE FOLLOWING FACTS:

I have been informed of the foregoing setouts facts by a person, who I know to be reliable, credible and trustworthy, who states the following facts: I, the affiant, have on this date, received information from a confidential source who states the house located at 3117 Liveoak Street which is occupied by Brent LaSalle Stein was visited in the past twenty-four hours and Marijuana was observed being smoked. The informant further states that there is still a quantity of marijuana in the house, and that it is kept in a Folgers coffee can located in the attic to the right of the ladder leading from the upstairs hall closet to the attic. This investigation has included surveilences and resulted in officers observing several known and several reported narcotic users. I, the affiant do personally know this house located at 3117 Liveoak Street is occupied by Brent LaSalle Stein, I, the affiant have received information from this confidential source on numerous occasions in the past and it has always been true and correct.

Wherefore, I ask that a warrant to search for and seize the said narcotic drug and dangerous drug at the above described premises be issued in accordance with the law in such cases provided.

/s/ R. D. RODGERS

Sworn to and subscribed before me by ----------, on this the 15th day of November, A.D. 1968.

7:30 p.m.

/s/ W. E. RUBBING
MAGISTRATE

Justice of the Peace, Precinct 7,
Place 1 Dallas County, Texas

(Filed Jan. 27, 1969)

IN THE

UNITED STATES DISTRICT COURT

FOR THE NORTHERN DISTRICT OF TEXAS

AT DALLAS

CIVIL ACTION NO. CA 3-2951-B

BRENT STEIN

Plaintiff

vs.

CHARLES BATCHELOR, Chief of Police, et al., and HENRY WADE, Criminal District Attorney, Dallas County

Defendant

MOTION TO DISMISS COMPLAINT

Henry Wade, Criminal District Attorney of Dallas County, Texas, moves to dismiss the complaint herein on each and all of the grounds that:

1. Plaintiff has failed to allege facts in the complaint upon which relief under the Civil Rights Act can be granted against Henry Wade, Criminal District Attorney.

Defendant Henry Wade, as Criminal District Attorney of Dallas County is immune from liability under the Civil Rights Act, and Plaintiff has failed to allege facts sufficiently to show abandonment of his quais-judicial role as a basis for liability.

2. The complaint herein fails to set forth a substantial claim of the "unconstitutionality" of Article 527 of the Texas Penal Code, or of its application. Since such complaint does not assert a substantial federal question, Plaintiff has not applied for a three-judge District Court under the provisions of 28 U.S.C. Sections 2281 and 2284 to hear and determine the alleged claim that Article 527 of the Texas Penal Code is unconstitutional.

3. Plaintiff requests that this Federal Court strike down and enjoin the enforcement of Article 527 of the Texas Penal Code, including the pending two criminal cases filed in the state courts of Texas. 28 U.S.C.A. Section 2283 prohibits such interference with pending state criminal cases. Furthermore, it is clear that the prohibition under Section 2283 against enjoining state court proceedings cannot be avoided by seeking a declaratory judgment.

WHEREFORE, the complaint herein should be dismissed.

WILSON JOHNSTON
/s/ JAMES M. WILLIAMSON
Assistant District Attorneys
of Dallas County, Texas

ATTORNEYS FOR HENRY WADE, CRIMINAL DISTRICT ATTORNEY, DALLAS COUNTY, TEXAS

Address: 7th Floor, New Courthouse
Dallas, Texas
75202

CERTIFICATE OF MAILING

I hereby certify that on the 27th day of January, 1969, I sent to Honorable David R. Richards, Attorney for Plaintiff, 1601 National Bankers Life Building, Dallas, Texas 75201, a true copy of the foregoing Motion to Dismiss, by mail, postage pre-paid.

/s/ JAMES M. WILLIAMSON

(Filed Jan. 30, 1969)

UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION

CIVIL ACTION NO. CA 3-2951-B

BRENT STEIN

vs.

CHARLES BATCHELOR, Chief of Police, City of Dallas; T. C. SNIDER, V. D. MONAGHAN; R. D. RODGERS, and HENRY WADE, District Attorney, Dallas County

MOTION TO DISMISS

TO THE HONORABLE JUDGE OF SAID COURT:

COMES NOW, CHARLES BATCHELOR, Chief of Police, City of Dallas; T. C. SNIDER; V. D. MONAGHAN and R. D. RODGERS, Defendants in the above numbered and styled cause, and files this their Motion to Dismiss upon the following grounds:

1.

Defendants move the Court to dismiss the Complaint of Plaintiffs for the reason that the Court lacks jurisdiction to afford the relief sought therein by Plaintiffs because of Title 28, USC, Section 2283, which provides as follows:

"A court of the United States may not grant an injunction to stay proceedings in a State Court

except as expressly authorized by Act of Congress, or where necessary in aid of its jurisdiction or to protect or effectuate its judgments."

The Complaint of the Plaintiffs does not allege that there is any exception to 28 U. S. Code Annotated, 2283. The Plaintiffs, by bringing this action against certain Police officers and the District Attorney, seeking the injunctive relief prayed for therein, cannot circumvent the above cited Anti-Injunction Statute of the United States. It is further submitted that Plaintiff has complete relief within the framework of the State courts and that there is no reason for this Court to accept jurisdiction of this cause. There is no allegation or claim of diversity or citizenship or that matters complained of have been decided by the highest court of the State, or that Plaintiff has not adequate relief or remedy in the State Courts. It is, to the contrary, clear from the pleadings of Plaintiff, that the two State Court actions, being Causes No. 68-2549 and 68-3977-C, were pending in the County Criminal Court of Dallas County, Texas, at the time of the filing of Plaintiff's Complaint, and that the said cases are still pending at this time; the said Cause No. 68-3977-C having been filed with the County Clerk of Dallas County on November 1, 1968, and Cause No. 68-2549 having been filed with the County Clerk of Dallas County on November 26, 1968.

2.

The Defendants say further that the Complaint filed herein by Plaintiff should be dismissed for the reason that the same fails to state a claim against Defendants upon which relief can be granted. Defendants say that the Complaint contains allegations that are nothing

more than bare generalities and does not meet the standards necessary to state a claim or cause of action as provided by law. Defendants say further that the relief sought hereby is so vague, general and speculative that it cannot be made the basis of a judgment.

3.

Defendants say further that in the event that the Court overrules their Motion as to jurisdiction and failure to state a claim, that the Court should use its judicial discretion as a basis for refusing to invoke its equity jurisdiction in this matter. It is submitted that under the circumstances of this case, the Court would be jusified in using its discretion in the avoidance of a multiplicity of suits in that there is a clear and adequate remedy at law in the State courts in which suits have already been filed for Plaintiff's claims to be heard and adjudicated. It is submitted that there is no showing of irreparable injury that would compel this Court to impose its jurisdiction upon the State courts or showing that the State courts would not give any and all of Plaintiff's Complaints fair and proper consideration under the laws of the State of Texas and of the United States.

WHEREFORE, PREMISES CONSIDERED, the Defendants, CHARLES BATCHELOR, Chief of Police, City of Dallas, T. C. SNIDER, V. D. MONAGHANS and R. D. RODGERS, pray that Plaintiff's Complaint be dismissed for lack of jurisdiction under 28 U. S. Code Annotated 2283, which forbids injunctions to stay proceedings in a State court except as expressly authorized by Act of Congress; that Plaintiff's Complaint be dismissed for the further reason

that it fails to state a claim or cause of action upon which relief can be granted; and in addition thereto, the case should be dismissed as a matter of judicial discretion in the public interest.

Respectfully submitted,

N. ALEX BICKLEY
City Attorney
City of Dallas, Texas

THOMAS B. THORPE
Assistant City Attorney

/s/ THOMAS B. THORPE
Office of the City Attorney

Attorneys for Defendants
City of Dallas
501 City Hall
Dallas, Texas 75201
RI-8-9711, Extension 295

(Certificate of Service Omitted)

(Filed Feb. 6, 1969)

UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION

CIVIL ACTION NO. CA 3-2951-B

BRENT STEIN

vs.

CHARLES BATCHELOR, Chief of Police, City of Dallas; T. C. SNIDER, V. D. MONAGHAN R. D. RODGERS and HENRY WADE, District Attorney, Dallas County

SUPPLEMENTAL MOTION TO DISMISS

TO THE HONORABLE JUDGE OF SAID COURT:

COMES NOW, CHARLES BATCHELOR, Chief of Police, City of Dallas; T. C. SNIDER; V. D. MONAGHAN; and R. D. RODGERS, Defendants in the above numbered and styled cause, and files this their Supplemental Motion to Dismiss upon the following grounds:

1.

That an agreement between Plaintiff and the above Defendants has been reached in regard to certain personal property previously held in custody by the Dallas Police Department, and all of such property has been returned to Plaintiff under the terms of an Indemnity and Release Agreement (said release of claims exclud-

ing injunctive relief) signed by Plaintiff on January 30, 1969, and supplemented by an additional Exhibit and Return of Property on February 5, 1969. The only property retained by the Police Department of the City of Dallas consists of film negatives, eight or ten photographs, one movie advertisement poster, one litho copy of paper, and a representative number of back issues of paper entitled "Dallas Notes" or "Notes from the Underground." The retained property relates directly to the two cases charging Defendant with possession of obscene materials presently pending in the County Criminal Courts of Dallas County, Texas, and identified as Cause No. 68-3977-C and Cause No. 68-2549. As provided for in Texas Code of Criminal Procedure rules pertaining to pre-trial discovery, Plaintiff's attorney has been voluntarily permitted to examine and inventory said retained property. The retained property has no effect upon Plaintiff's publishing or distributing his paper identified as "Dallas Notes."

It is furthermore stated by Defendants herein that there is no "unlawful" surveillance or harassment being conducted or contemplated against Plaintiff, and there is no "unlawful" arrest or "unlawful" search and seizure contemplated or intended by Defendants. The Defendants do say that they are charged with the responsibility of enforcing the Criminal laws of the State of Texas, and Ordinances of the City of Dallas, and will do so as it relates to this Plaintiff as well as any other person.

2.

The above and foregoing is submitted to the Court as further basis for the Court to exercise its judicial discretion by refusing to invoke its equity jurisdiction

in this matter and refusing the injunctive relief sought by Plaintiff as it relates to the above named Defendants. There would be no resulting irreparable injury to Plaintiff by this action of the Court, and would simply leave Plaintiff to existing remedies available in the State Court, and would be an exercise of discretion to avoid a multiplicity of suits. (See Paragraph 3 of Motion to Dismiss and Paragraph III of Memorandum Brief in Support Thereof filed herein by Defendants).

WHEREFORE, PREMISES CONSIDERED, the Defendants, Charles Batchelor, Chief of Police, City of Dallas, T. C. Snider, V. D. Monaghan, and R. D. Rodgers, re-assert their prayer for relief as contained in their Original Motion to Dismiss filed herein on January 30, 1969.

Respectfully submitted,
N. ALEX BICKLEY
City Attorney
City of Dallas, Texas

THOMAS B. THORPE
Assistant City Attorney

/s/ THOMAS B. THORPE
Office of the City Attorney
City of Dallas, 501 City Hall
Dallas, Texas 75201
RI-8-9711, Extension 295

Attorneys for Defendants,
Charles Batchelor, Chief of
Police, T. C. Snider,
V. D. Monaghan, and
R. D. Rodgers

(Certificate of Service Omitted)

(Filed March 10, 1969)

UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION

CIVIL ACTION NO. CA 3-2951-B

BRENT STEIN

vs.

CHARLES BATCHELOR, Chief of Police, City of Dallas; T. C. SNIDER, V. D. MONAGHAN, R. D. RODGERS, and HENRY WADE, District Attorney, Dallas County

FIRST AMENDED COMPLAINT

TO THE HONORABLE JUDGE OF SAID COURT:

1.

This action arises under the first, fourth, fifth, sixth, ninth, and fourteenth amendments of the Constitution of the United States and under Secs. 1983 and 1985(2) of Title 42 of the United States Code. Jurisdiction is conferred upon this court by the provisions of Sec. 1343(3)(4) of Title 28 of the United States Code. Plaintiff by this action seeks the equitable and legal remedies provided by 28 U.S.C. Sec. 1343 and declaratory relief under 28 U.S.C. Sec. 2201.

2.

The plaintiff is Brent Stein, a resident of Dallas County, suing on his own behalf and on behalf of a

class of persons similarly situated, pursuant to Rule 23 of the Federal Rules of Civil Procedure. Brent Stein is the publisher of newspaper known as the "Dallas Notes." The class which he represents is composed of present and future employees of and contributors to the "Dallas Notes," and persons engaged in the distribution of the "Dallas Notes," a class too numerous to make it practicable to bring them all before the court. The claim of the plaintiff is typical of the claims of the class and there are questions of law and fact common to the class and your plaintiff will fairly and adequately protect the interests of the class. Parties opposing the plaintiff and the class have acted on grounds generally applicable to the class thereby making final injunctive relief or declaratory relief appropriate with respect to the class as a whole.

3.

The defendants are Charles Batchelor, Chief of Police, City of Dallas, Texas, T. C. Snider, V. D. Monaghan, and R. D. Rodgers, all members of the Dallas Police Department, and Henry Wade, District Attorney of Dallas County, all of whom are sued in their official capacities, relief is sought as to them and to their successors in office.

4.

The nature of this cause is that your plaintiff and the class he represents has been, is being, and will continue to be deprived by the Dallas Police, acting under color of law, of rights, privileges and immunities guaranteed by the Constitution of the United States, and specifically rights of freedom of speech, freedom of press, and freedom from unreasonable

searches and seizures as those rights are protected from invasion by the state by the 14th Amendment to the United States Constitution. Further, your plaintiff is currently being prosecuted, and fears future prosecution, by the defendant, Henry Wade, District Attorney of Dallas County, under a state statute, to-wit, Article 527 of the Penal Code of the State of Texas. Prosecution under said statute deprives plaintiff of rights protected by the 1st, 4th, 5th, 6th, 9th and 14th Amendments to the United States Constitution.

5.

The "Dallas Notes" is a newspaper published twice monthly in Dallas County for general distribution to the public. It has been published, sold and distributed by your plaintiff, Stein, and his predecessors, and the class he represents, continuously for a two year period. The "Dallas Notes" is a member of what is known as the "Underground Press." Although it differs from the conventional daily press, the "Dallas Notes" constitutes a legitimate expression of a point of view, political and social, fully entitled to all indulgences of the constitutional protections of freedom of the press and freedom of speech.

6.

Members of the Dallas Police under the supervision of defendant Batchelor have demonstrated increasing hostility to the existence of the "Dallas Notes" and to the persons responsible for its publication and distribution. This hostility has been manifested in unlawful surveillance of the location at which the "Dallas Notes" is published, and unlawful harassment by arrest and threat of arrest of persons engaged in the publication and distribution of the "Dallas Notes" paper.

7.

More specifically, plaintiff Stein, was illegally arrested and detained and his car searched without just or proper cause in November, 1968, by members of the Dallas Police Department, who indicated they knew Stein and who conceded at the time that they had no basis for the arrest and search.

8.

Further, on October 30, 1968, your defendants, Snider and Monaghan, along with numerous other Dallas policemen, under the supervision and control of the defendant Batchelor, obtained a warrant to search the premises at 3117 Live Oak in the City of Dallas, these premises included the residence of Stein and the situs for the preparation and distribution of the "Dallas Notes." This warrant was obtained and executed in violation of the Constitutional guarantees contained in the 1st, 4th, 5th, 6th, 9th, and 14th Amendments to the Constitution. Among other infirmities the warrant was issued without probable cause, was a general warrant, and authorized the indiscriminate seizure of written materials by the police without a prior judicial determination of their obscenity, and permitted a prior restraint of speech. (Copies of the Affidavit in support of the warrant and warrant are attached as Exhibit A.) In the execution of the warrant, the police officers seized not only alleged obscene photographs, but thousands of newspapers and books, private papers, a photograph enlarger, two portable typewriters, two electric typewriters, one camera, and certain amount of money, all of which related to the publication of the "Dallas Notes." The seizure of these articles had as its only

purpose interference with publication of the "Dallas Notes," and was without just or proper cause. At the time of the unlawful search and seizure of October 30th, Dallas Police arrested the plaintiff Stein, as well as other persons found at the premises, which arrests were unlawful, and were intended to, and did have, the effect of discouraging persons from associating with, contributing to or assisting in the publication of the "Dallas Notes."

9.

Following the unlawful arrest and seizure of October 30, 1968, plaintiff Stein made arrangements to secure new equipment essential to the publication of the "Dallas Notes" and resumed publication. On November 15, 1968, representatives of the Dallas Police Department again obtained a warrant to search the residence of Mr. Stein and the home of the "Dallas Notes," this warrant too was obtained and executed in violation of the guarantees of the 1st, 4th, 5th, 6th, 9th and 14th Amendments of the Constitution. (The warrant and affidavit are attached hereto as Exhibit B.) This warrant purported to authorize seizure of marijuana alleged to be on the premises. No marijuana was present, nevertheless, the Dallas Police unlawfully seized three cameras, one safety light, one lamp, one desk containing printing supplies, five cardboard boxes containing personal records and documents, two telephones, typewriters, and other property of the plaintiff Stein used in the publication of the "Dallas Notes," and other miscellaneous property of the plaintiff. The seizure of this material was again for the sole purpose of inhibiting the publication of the "Dallas Notes," was without justifiable cause and abridged the Constitutional rights of your plaintiff.

10.

Oral and written demand was made upon the Dallas Police Department for return of the confiscated material. These requests were refused and/or ignored until filing of the present suit. Although the material has now been returned, plaintiff asserts that unless restrained from future depredations of this type, the Dallas Police will engage in further unlawful searches and seizures for the purpose of preventing the publication and distribution of the "Dallas Notes," all in violation of the Constitutional rights of the plaintiff and the class which he represents.

11.

In addition, representatives of Dallas Police unknown to plaintiff, have engaged in other unlawful acts, including interfering with contractual arrangements of the "Dallas Notes," and threatening persons selling the "Dallas Notes" with arrest for the sole purpose of interfering with and impeding the publication of the "Dallas Notes," all in violation of the Constitutional rights of the plaintiff and the class he represents.

12.

The aforesaid actions of the Dallas Police have not been undertaken in good faith but rather for the purpose of suppressing political dissent and inhibiting plaintiff and others in the exercise of their Constitutional rights of freedom of speech and press.

13.

The conduct on the part of the Dallas Police is part of a conspiracy having as its object prohibiting the ex-

pression of ideas, and having as its ultimate goal the suppression of the "Dallas Notes," all in violation of the Constitutional rights of the plaintiff and the class he represents.

14.

With respect to the defendant Henry Wade, the District Attorney of Dallas County, there are currently pending against the plaintiff two criminal misdemeanor cases in the County Criminal Courts of Dallas County, being criminal causes 68-2549 and 68-3977C, charging plaintiff with possession of obscene "paper" and "pictures" in violation of the obscenity statute of the State of Texas, being Article 527 of the Texas Penal Code. These prosecutions are based in part upon plaintiff's possession of copies of the "Dallas Notes" alleged to be obscene. In connection with these pending prosecutions your plaintiff alleges that the prosecutions are based in their entirety upon property taken by unlawful search and seizure in violation of the 1st, 4th, 5th, 6th, 9th and 14th Amendments of the Constitution, and further said statute under which the state proceeding is unconstitutional on its face, and is unconstitutional as attempted to be applied to plaintiff.

16.

Your plaintiff seeks declaratory relief under 28 U.S.C. Sec. 2201 determining the application of the provisions of Article 527 of the Texas Penal Code to the plaintiff and to "Dallas Notes," praying Court take jurisdiction of the cause and pursuant to the provisions of Sec. 2201 declare that Article 527 of the Texas Penal Code is unconstitutional on its face and as applied to the "Dallas Notes," for the reasons that

such application of the statute to the "Dallas Notes" "invades the area of protected freedoms." Without limiting his contentions, plaintiff asserts that the statute suffers from unconstitutional overbreadth, in that it seeks to punish for mere possession of obscene material, and the statute is devoid of any language that requires a finding that the material have no redeeming social value. Finally, the statute violates rights of equal protection and due process as it arbitrarily exempts from its reach "daily and weekly newspapers," and yet leaves open to prosecution bi-monthly newspapers, such as the "Dallas Notes."

17.

In support of prayer for declaratory relief, plaintiff asserts that he wishes to continue publication and distribution of the "Dallas Notes" with content of a nature similar to that which has exposed him to arrest and prosecution in the past. Plaintiff fears future arrests and prosecution under Article 527 unless his rights thereunder are declared by this Court.

WHEREFORE, premises considered, your plaintiff respectfully prays:

(A) That this court take jurisdiction of the cause, and determine that this is a proper class action;

(B) That upon final hearing, the Court grant the permanent injunctive relief against the Dallas Police Department, requiring that (1) there be no arrest of plaintiff, nor seizure of his property on grounds of obscenity without a prior judicial determination of the obscene character of the material in question; (2) that affirmative instructions be issued throughout the Dallas

Police Department advising of the constitutional standards governing arrest without warrant, search and seizure, and the rights of freedom of speech and press;

(C) That the Court adjudge, decree and declare the rights of the parties with respect to the application of Article 527 of the Texas Penal Code;

(D) That the Court grant such other and further relief as is just and equitable.

Respectfully submitted,

DAVID R. RICHARDS
1601 National Bankers Life Building
Dallas, Texas 75201

(Exhibits A and B to the foregoing complaint are identical to the exhibits to the original complaint and are omitted.)

(Filed March 20, 1969)

UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION

CIVIL ACTION NO. CA 3-2951-B

BRENT STEIN

VS.

CHARLES BATCHELOR, Chief of Police, City of Dallas; T. C. SNIDER, V. D. MONAGHAN, R. D. RODGERS, and HENRY WADE, District Attorney, Dallas County

RESPONSE BY THE STATE OF TEXAS

Now comes the State of Texas acting by and through its duly elected Attorney General, Crawford C. Martin and by way of amicus curiae would respectfully address the Court in regard to the above numbered and styled cause.

I.

STATEMENT OF THE CASE

The Attorney General of the State of Texas received a copy of Plaintiff's First Amended Complaint on March 13, 1969, from the Honorable Henry Wade, District Attorney of Dallas County, Texas. (Earlier a copy of the original Complaint had been received from counsel for Plaintiff.)

At issue here is Article 527 of the Texas Penal Code, the statute providing

Art. 527. 509 Acts involving obscene articles, objects and materials; fines and penalties; exemptions

Section 1. Whoever shall knowingly photograph, act in, pose for, model for, print, sell, offer for sale, give away, exhibit, televise, publish, or offer to publish, or have in his possession or under his control, or otherwise distribute, make, display, or exhibit any obscene book, magazine, story, pamphlet, paper, writing, card, advertisement, circular, print, pictures, photograph, motion picture film, image, cast, slide, figure, instrument, statue, drawing, phonograph record, mechanical recording, or presentation, or other article which is obscene, shall be fined not more than One Thousand Dollars ($1,000) nor imprisoned more than one (1) year in the county jail or both.

Sec. 2. Whoever shall knowingly offer for sale, sell, give away, exhibit, televise, or otherwise distribute, make, display, or exhibit any obscene book, magazine, story, pamphlet, paper, writing, card, advertisement, circular, print, pictures, photograph, motion picture film, image, cast, slide, figure, instrument, statue, drawing, phonograph record, mechanical recording, or presentation, or other article which is obscene, to a minor shall be fined not more than Two Thousand, Five Hundred Dollars ($2,500) nor imprisoned in the county jail more than two (2) years or both.

Sec. 3. For purposes of this article the word "obscene" is defined as whether to the average person, applying contemporary community standards, the dominant theme of the material taken as a whole appeals to prurient interests. Provided, further, for the purpose of this article, the term "contemporary community standards" shall in no case involve a territory or geographic area less than the State of Texas.

Sec. 4. Whoever shall be convicted for the second time of a violation of this article shall be deemed guilty of a felony and shall be punished by confinement in the State penitentiary for not more than five (5) years or by a fine of not more than Ten Thousand Dollars ($10,000) or by both such fine and imprisonment.

Sec. 5. It shall be a defense to any charges brought hereunder if such prohibited matter or act shall be regularly in use in any bona fide religious, education or scientific institution or the subject of a bona fide scientific investigation.

The provisions of this Act shall not apply to any motion pictures produced or manufactured as commercial motion pictures which (1) have the seal under the Production Code of the Motion Picture Association of America, Inc., or (2) legally move in interstate commerce under Federal Laws or (3) are legally imported from foreign countries into the United States and have been passed by a Customs Office of the United States Government at any port of entry.

The provisions of this Act shall not apply to any daily or weekly newspaper.

Sec. 6. The district courts of this State and the judges thereof shall have full power, authority, and jurisdiction, upon application by any district or county attorney within their respective jurisdiction, to issue any and all proper restraining orders, temporary and permanent injunctions, and any other writs and processes appropriate to carry out and enforce the provisions of this Act.

THE NECESSITY OF CONVENING A THREE-JUDGE COURT TO GRANT THE RELIEF PRAYED FOR IN THE FIRST AMENDED COMPLAINT

It is apparent that, in substance, the First Amended Complaint alleges that Article 527, Texas Penal Code, is unconstitutional and that accordingly, an injunction should be issued to restrain the peace officers and prosecutors of Dallas County, Texas, from attempting to enforce the provisions of this statute, a statute having statewide application.

While the Complaint calls for declaratory relief under Section 2201, Title 28, U.S.C., no relief can thereby be afforded Plaintiff unless Article 527 is held to be unconstitutional and injunctive restraint of the law enforcement officials is ordered.

This relief cannot be afforded except through an application of the provisions of Sections 2281 through 2284, Title 28, U.S.C. *Moody v. Flowers*, 387 U.S. 97 (1967), 87 S.Ct. 97. See also *Cameron v. Johnson*, 390 U.S. 611 (1968), 88 S.Ct. 1335, rehearing den. 391 U.S. 971, 88 S.Ct. 2029.

This Court's initial inquiry should therefore be the propriety of requesting the convening of a three-judge court.

THE GOVERNOR AND THE ATTORNEY GENERAL OF TEXAS SHOULD BE GIVEN PROPER NOTICE OF THE PENDENCY OF THE CASE.

As observed above, Plaintiffs are seeking to restrain the enforcement of a law of Texas which defines obscenity and provides penalties for violations of the terms of the law. As also noted the relief prayed for would require action by a three-judge federal court.

Subsection 2 of Section 2284, Title 28, United States Code provides in part as follows:

"(2). If the action involves the enforcement, operation or execution of State statutes or State administrative orders, at least five days notice of the hearing shall be given to the governor and attorney general of the State.

. . . .

"Such notice shall be given by registered mail or by certified mail by the clerk and shall be complete on the mailing thereof."

The State of Texas, through its Attorney General, states that no notice as provided for by the above statute has been received.

Since the inquiry herein must of necessity revolve around the propriety of forming a three-judge court, the proper notice should be given.

Although this response is in the nature of amicus curiae, the State of Texas is also a real party in interest inasmuch as its laws are attacked as being violative of the Constitution of the United States. And while the Governor and Attorney General of the State of Texas now have actual notice of this suit, it is felt that the provisions of subsection (2) of Section 2284 should be enforced according to their terms so as to forcefully bring to the attention of all parties, seeking to enjoin the enforcement of state statutes, the fact that the federal courts will require that the proper notice be given. This requirement will serve to prevent other suits in other parts of the State of Texas, attacking this and other statutes, from being filed without complying with the proper notice requirements. It is conceivable that such suit could be filed and lead to the issuance of an injunction against the enforcement of state statutes of statewide application without the crit-

state officials warning of the suit and having the opportunity to defend the constitutionality of the statute attacked.

The United States Court of Appeals for the Fifth Circuit in *Jackson v. Choate*, decided on November 23, 1966, incorporated as an appendix a memorandum of the Honorable John R. Brown, Chief Judge of the Court. In this memorandum Judge Brown expresses the opinion that a three-judge court should be formed in order to determine the propriety of convening the three-judge court in the interest of conserving judicial time.

However, the State of Texas questions the correctness of Judge Brown's conclusions and would point to *Hall v. New York*, 359 F.2d 26 (2nd Cir., 1966), cert. denied 385 U.S. 879 (1966), wherein the Court held that a district court had no jurisdiction to entertain an application for a three-judge court where the five (5) day notice of hearing was not given to the governor and the attorney general of the state as required by 28 U.S.C., Section 2284 (2). This case accordingly stands for the proposition that the question of whether a three-judge court should be convened should be left to the district court where the complaint is filed where the requested relief, an injunction against the enforcement of a state statute, requires three-judge court action.

However, in any event, whether *Jackson v. Choate* or *Hall v. New York* be deemed to be the correct statement of the law regarding the convening of a three-judge court, a three-judge court is required here if state officials are to be enjoined from enforcing the terms of Article 527, and notice should be given to the

governor and the attorney general as to the pendency of this action.

ARTICLE 527, THE TEXAS OBSCENITY STATUTE IS CONSTITUTIONAL, THERE BEING NO SUBSTANTIAL FEDERAL QUESTION RAISED BY THE PLEADINGS.

The critical issue in this case, whether considered by an individual federal judge or by a three-judge court, is whether or not the Plaintiffs' claim of unconstitutionality directed at Article 527 raises a substantial federal question.

The criteria in measuring substantiality in a federal question should be either that it is obviously without merit or that the question has been foreclosed by prior decisions of the United States Supreme Court. *California Water Service v. Redding*, 304 U.S. 252 (1938); *Gircin v. Board of Elections*, 380 F.2d 445 (2nd Cir. 1967), cert. denied, 389 U.S. 1048 (1968).

Accordingly, it has been held that where the state statute in question has been determined to be constitutional by the Supreme Court of the United States, a three-judge court is not required. *Klein v. Lee*, 254 F.2d 188 (7 Cir. 1958), vacated 358 U.S. 645 (1959), rehearing den. 359 U.S. 962 (1959); *Moss v. Hornig*, 314 F.2d 89 (2 Cir. 1963).

And while it is not completely clear, the obscenity statute of Texas has been inferentially held to be constitutional by the Supreme Court. The Court of Criminal Appeals of Texas upheld the constitutionality of Article 527 in *Pfeiffer v. State*, 396 S.W.2d 396 (1965). The United States Supreme Court denied certiorari, 382 U.S. 943 (1965). Justice Black and Douglas dis-

senting. The Supreme Court also refused to grant certiorari in *Ford v. Miami*, —— U.S. ——, 88 S.Ct. 231 (1967), to review a Florida statute containing the same definition of obscenity as that in the Texas statute. Justices Stewart, Black and Douglas, who are at least consistent in opposing all convictions under obscenity statutes, dissented in the *Ford* case and pointed out that the petitioner was convicted under a statute that did no comport with Justice Brennan's expansion of the *Roth* test in *Memoirs v. Massachusetts*, supra. It is noted that neither Justice Brennan nor the other five members of the Court who declined to vote for review thought this raised a constitutional question of sufficient weight to merit certiorari. Admittedly, the foregoing authority is not clear, but what there is supports the constitutionaliy of Article 527.

On the issue of whether the federal question is without merit, the Plaintiff's attack on the constitutionality of the statute must be considered. Plaintiff's contention here that Article 527 is unconstitutional may be fairly summarized as follows: (1) Article 527 does not include in its definition of obscenity that the material must be utterly without redeeming social value. (2) Article 527 is unconstitutionally overbroad in that it seeks to punish for mere possession of obscene materials. (3) That it offends equal protection because it exempts from its reach "daily and weekly newspapers" and yet permits prosecution based on the contents of "bi-monthly newspapers" and (4) Article 527 is unconstitutional because it contains no provision for judicial determination of obscenity before seizure.

The Definition Of Obscenity In Article 527 Is Constitutionally Sound And Sanctioned.

Initially, Plaintiffs say that the Texas statute is unconstitutional because its definition of obscenity does not meet the standards as set forth by *Memoirs v. Massachusetts*, 383 U.S. 413 (1966) in that it does not include a requirement that the alleged obscene item be "utterly without redeeming social value." In answering this contention, it should be pointed out that the definition of "obscene" in Article 527 was taken verbatim from *Roth v. United States*, 354 U.S. 476 (1957). There have been decisions since *Roth* which "elaborated" on its definition of obscenity, for example, *Memoirs v. Massachusetts*, supra, 383 U.S. at 418, but they most assuredly did not overrule it.

Indeed, the opinion in *Memoirs* points out that the question, which was before the state courts in that case, was whether or not the subject book satisfied the test of obscenity "*established in Roth v. United States.*" (Emphasis added; page 418 of the opinion.)

Moreover, in *Jacobellis v. Ohio*, 378 U.S. 184 (1964), Justice Brennan said at page 191:

> "Recognizing that the test for obscenity (in Roth) is not perfect, we think any substitute would raise equally difficult problems, and we therefore adhere to that standard."

In a dissenting opinion in *Jacobellis*, Chief Justice Warren, joined by Justice Clark, said, (378 U.S. at 200):

> "For all the sound and fury that the Roth test has generated, it has not been proven unsound, and I believe that we should try to live with it—at least until a more satisfactory definition is evolved. . . ."

Accordingly, the contention that Article 527 is un-

constitutional because it makes no reference to the "no redeeming social value" of *Memoirs*, has no merit. The test of obscenity expressed in *Roth* is still the law and the Texas definition of obscenity was taken directly from *Roth*. While the trial courts of Texas may have to formulate a charge to the jury in terms of the "no redeeming social value" injunction of *Memoirs*, the statute itself does not fall because it does not contain this language.

The Possibility That Article 527 Prohibits The Mere Possession Of Obscene Materials Does Not Render The Statute Unconstitutional.

Observation should first be made that no Texas decision has held that the mere possession of obscenity is a violation of Article 527. On the contrary, the Court of Criminal Appeals in *Ex parte Phelper*, 433 S.W.2d 897, decided on December 4, 1968, expressly refused to consider this question. This Court should not attempt to interpret the Texas statute as Plaintiffs suggest until there is a direct holding by the highest court of Texas on the possession question or until there is a prosecution for mere possession.

It should further be noted that the Supreme Court of the United States has never held that prosecution for nothing more than possession of obscene materials or articles is an unconstitutional abridgement of due process standards.

It should finally be submitted that even if the courts of Texas later hold that mere possession of obscenity is punishable under Article 527, the entire statute should not be struck down as being in violation of the United States Constitution.

No Unfairness Exists In Article 527 Because It Assertedly Denies Equal Protection.

Plaintiff's complaint with regard to the denial of equal protection is directed at the exemption in Article 527 which excludes daily and weekly newspapers from the operation of the statute. This exemption can mean that publishers and vendors of magazines and publications which are denominated newspapers, but which are published less frequently than weekly, can be punished under the terms of the statute while daily and weekly newspapers are not punishable.

It should first be observed that the legal publication, *Words and Phrases*, defines a newspaper as a publication printed and distributed at regular intervals, usually daily or weekly, and containing news, opinions, advertisements and other matters of public interest.

Article 28a, Vernon's Civil Statutes, defines a newspaper as follows:

> "(2) The term 'newspaper' shall mean any newspaper devoting not less than twenty-five (25) per cent of its total column lineage to the carrying of items of general interest, published not less frequently than once each week. . . ."

It is submitted that the exclusion of newspapers which is contained in Article 527, that the statute "shall not apply to any daily or weekly newspapers," follows the general definition of what a newspaper has come to mean.

The legislature is entitled to take notice and cognizance, in the passage of criminal statutes, that obscenity is more likely to be purveyed by means of magazines and books and is less likely to be a part of daily and

weekly newspapers. In other words, obscenity is not ordinarily spawned by what the public has come to accept as a "newspaper" but rather has its birth and inception in books and magazines.

The State of Texas submits that this is a reasonable classification which the legislature can make in the enactment of its penal statutes, and the state further observes that all people that do not fit within the weekly or daily newspaper exemption are treated alike and equally. See *Ford v. Attorney General of Pennsylvania*, 184 F. Supp. 129, affirmed 364 U.S. 291.

This same legislative judgment, that obscenity is a greater problem in publications that are not either daily or weekly newspapers, carries over into the exemption on films which move in interstate or foreign commerce or which have the seal under the production code of the Motion Picture Association of America. Past experience has indicated that obscenity more often rears its head in motion pictures displayed in penny arcade emporiums than in the movie houses of this and other states. (At least this was true at the time Article 527 was passed.) Again, the judgment of the legislature in determining the more critical sources of obscenity should not be judicially second-guessed.

In summary, the Legislature of Texas has set up classes within which obscenity was (and perhaps is) the greater problem. Within the classes as drawn, all members are treated equally and alike. No violation of equal protection is shown or demonstrated.

The Lack Of An Intrinsic Judicial Procedure For Making A Determination As To Obscenity Prior To Or After Seizure Does Not Render Article 527 Unconstitutional.

Plaintiffs additionally contend that there should be some procedure set out in the Texas obscenity statute so that there can be a prior judicial determination made on the question of whether materials to be seized are obscene. This contention is lacking in efficacy.

Observation is made that, while Article 527 contains no provision for a prior judicial determination on whether or not any materials are obscene prior to seizure or prosecution, this fact alone does not render the statute unconstitutional. It may be that in an obscenity prosecution, the peace officers of Texas will have to obtain the article alleged to be obscene in some fashion other than by seizure pursuant to an arrest or pursuant to a search warrant. Then, in the trial on the merits there can be a judicial determination as to whether the article is, in fact and law, obscene.

But, it is again reiterated that the mere absence of a provision for a prior judicial hearing on the question of obscenity prior to seizure should not mean that Article 527 is unconstitutional in its entirety.

What the Supreme Court has indicated in its decisions is that *procedures* for seizing alleged obscenity are constitutionally bad without some preliminary, adversary, judicial hearing and determination on the question.

In *A Quantity of Books v. Kansas*, 378 U.S. 205 (1964) the Supreme Court condemned the seizure proceedings which were exercised to enforce the Kansas obscenity statute. The court said at page 210 of the opinion,

> "It is our view that since the warrant here authorized the sheriff to seize all copies of the speci-

dled titles, and since P-K was not afforded a hearing on the question of the obscenity *vel non* of the seven novels before the warrant issued, *the procedure was, likewise, constitutionally deficient.*" (Emphasis added)

Again at pages 210 and 211 the court stated:

> "We therefore conclude that in not first according P-K an adversary hearing, *the procedure leading to the seizure order was constitutionally deficient.*" (emphasis added)

The court concluded at page 213 as follows:

> ". . . if seizure of books precedes an adversary determination of their obscenity, there is danger of abridgment of the right of the public in a free society to unobstructed circulation of non-obscene books. . . . Here, as in Marcus, 'since a violation of the Fourteenth Amendment infected the proceedings, in order to vindicate appellants' constitutional rights' 367 U.S., at 738, the judgment resting on a finding of obscenity must be reversed."

It seems clear that what the Supreme Court was condemning in *A Quantity of Books v. Kansas*, was the procedure used to obtain the alleged obscenity materials. The Kansas statute defining obscenity and punishing it was not declared to be unconstitutional.

Accordingly, it is submitted that the absence of the provision of an adversary proceeding to determine obscenity prior to seizure should not invalidate Article 527 in its entirety. The peace officers of Texas can purchase materials and objects they feel to be obscene from whoever may possess them and the prosecution may be instituted on the basis of the purchased articles. This procedure would in no way offend the injunction of and rule announced by *A Quantity of Books v. Kansas*.

CONCLUSION

It should again be made clear that the interest of the State of Texas as amicus centers around the constitutional attack on Article 527, the state believing the statute is constitutional on its face. This amicus is unaware of what exactly the evidence will reveal upon a hearing of this cause. However, regardless of the *procedures* used in the attempted enforcement of Article 527, in this particular situation amicus submits that the statute is valid and should not be held to be unconstitutional.

WHEREFORE, premises considered, Amicus prays that the contentions made herein, as to the propriety of convening a three-judge court, as to the necessity of proper notice, and as to the constitutionality of Article 527, be given consideration by the Court and that upon final hearing, Article 527 be declared to be constitutional.

Respectfully submitted.

CRAWFORD C. MARTIN
Attorney General of Texas

HAWTHORNE PHILLIPS
Executive Assistant

ROBERT G. FLOWERS
Assistant Attorney General

LONNY F. ZWEINER
Assistant Attorney General

Attorneys for the State of Texas
Box "R" Capitol Station
Austin, Texas 78711

(Certificate of Service omitted.)

(Filed Mar. 20, 1969)

IN THE

UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION

C.A. NO. 3-2951

BRENT STEIN

vs.

CHARLES BATCHELOR, Chief of Police, City of Dallas; T. C. SNIDER, V. D. MONAGHAN, R. D. RODGERS, and HENRY WADE, District Attorney, Dallas County

MOTION TO CONSIDER RESPONSE IN AMICUS CURIAE

TO THE HONORABLE JUDGES OF SAID COURT:

Now comes the State of Texas and moves this Court to consider the attached Response by the State of Texas submitted as amicus curiae in reaching a determination on the issues presented by the Complaint herein. The reasons for this type of submission are set out in the Response.

WHEREFORE, premises considered, the State of Texas prays that the attached response be filed with the papers of this cause and be considered by this Court in reaching its decision in this cause.

Respectfully submitted,

CRAWFORD C. MARTIN
Attorney General of Texas

HAWTHORNE PHILLIPS
Executive Assistant

ROBERT C. FLOWERS
Assistant Attorney General

LONNY F. ZWIENER
Assistant Attorney General

Attorneys for the State of Texas
Box "R" Capitol Station
Austin, Texas 78711

(Filed Apr. 1, 1969)

UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION

CIVIL ACTION NO. CA 3-2951-B

BRENT STEIN

vs.

CHARLES BATCHELOR, Chief of Police, City of Dallas; T. C. SNIDER, V. D. MONAGHAN, R. D. RODGERS, and HENRY WADE, District Attorney, Dallas County

MOTION FOR SUMMARY JUDGMENT

TO THE HONORABLE JUDGE OF SAID COURT:

COMES NOW the plaintiff and pursuant to the provisions of Rule 56 of the Federal Rules of Civil Procedure moves for partial summary judgment declaring Article 527 of the Penal Code of the State of Texas unconstitutional and in support thereof would show:

1.

Plaintiff seeks declaratory judgment establishing that Article 527 of the Penal Code of the State of Texas is unconstitutional. There is no genuine issue as to any material fact with respect to this aspect of the cause, and plaintiff is entitled to summary judgment as a matter of law declaring Article 527 unconstitutional.

2.

Plaintiff in making this motion for summary judgment relies upon the depositions of defendant police officers Snider, Monaghan, and Rodgers, and pleadings and the attached affidavit of plaintiff Brent Stein.

3.

WHEREFORE, PREMISES considered, your plaintiff respectfully prays that summary judgment be granted, declaring Article 527 of the Penal Code of the State of Texas unconstitutional.

Respectfully submitted,

DAVID R. RICHARDS

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that I have this 1st day of April, 1969, caused a copy of the foregoing Motion for Summary Judgment to be served to the following individuals by depositing same in the U.S. Mail, postage prepaid:

Mr. Tom Thorpe
Assistant City Attorney
Office of City Attorney
City Hall
Dallas, Texas

Mr. Henry Wade
District Attorney
County Courthouse
Dallas, Texas

Mr. Wilson Johnston
Office of the District Attorney
Dallas County Courthouse
Dallas, Texas

DAVID R. RICHARDS

UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION

CIVIL ACTION NO. CA 3-2951-B

BRENT STEIN

vs.

CHARLES BATCHELOR, Chief of Police, City of Dallas; T. C. SNIDER, V. D. MONAGHAN, R. D. RODGERS, and HENRY WADE, District Attorney, Dallas County

AFFIDAVIT

In support of the Motion for Summary Judgment herein, the undersigned affiant makes this affidavit and thereby on oath states the following:

1.

I am over twenty-one years of age, am of sound mind, and have personal knowledge of every statement made herein, and am fully competent to testify the matters stated herein:

2.

I am the editor and publisher of the newspaper known as the "Dallas Notes," and have been in such capacity for a period of time in excess of six months. During the time that I have been in this capacity, the "Dallas Notes" has been published regularly twice monthly and distributed generally throughout Dallas County. It is distributed both by mail and direct sales through newsstand and individual salesmen. Its price

is twenty cents per issue in Dallas and thirty cents outside Dallas.

3.

The present circulation of the "Dallas Notes" is approximately 2500 copies per issue, both by sales and subscriptions. The content of the "Dallas Notes" is similar to most newspapers, as it contains intelligence of current events and news of general interest, and commentary upon entertainment. Attached to incorporate it with this affidavit is the most recent issue of the "Dallas Notes" of March 5, 1969 which is typical of the issues of the papers during the time I had been editor, both as to size and content.

4.

As a consequence of a search and seizure by the Dallas police on October 30, 1968, I am presently being prosecuted by Henry Wade, criminal District Attorney of Dallas County, Texas, for alleged unlawful possession of "obscene pictures" in cause number 68-3977-C pending in the County Criminal Court Number 3 of Dallas County, Texas. As a consequence of a search and seizure carried out by the Dallas police on or about November 15, 1968, I am currently being prosecuted by Henry Wade, criminal District Attorney of Dallas County, Texas, for alleged unlawful possession of "obscene paper" in cause number 68-2549 pending in the County Criminal Court of Dallas County, Texas. I am informed by my attorney that in both of these prosecutions the State relies upon as a portion of their evidence issues of the "Dallas Notes."

It is my present intention to continue publication of the "Dallas Notes" in Dallas County, Texas and to continue to distribute it throughout Dallas area. It is further my intention and desire to continue to include in the newspaper material similar to that contained in the previous issues of the "Dallas Notes" which have been characterized by the Dallas police, the District Attorney's office as constituting obscenity in violation of Article 527 of the Penal Code of the State of Texas.

BRENT STEIN

SUBSCRIBED AND SWORN TO, before me, this 1st day of April, 1969.

A. E. PENELL
Notary Public in and for County of Dallas, Texas

EXCERPTS FROM THE DEPOSITION OF TRUMAN C. SNIDER

(The Deposition is not bound with the Record in this case but appears as a separately bound volume. Page notations below are to the Deposition volume)

[At page 4]

By Mr. Richards

Q Give us your full name, sir.

A Truman C. Snider.

Q How are you employed, Mr. Snider?

A Dallas Police Department in the Vice Control Division.

Q And you rank?

A Lieutenant.

Q You are the same Lieutenant Defendant in this suit brought by Mr. Stein?

A Yes Sir.

* * *

[At page 10]

* * *

Q All right. In connection with the return of October 30, 1968, I take it that the decision to seek the search warrant was made by you and Sergeant Monaghan, is that correct?

A Yes, sir. Well, really it was me.

Q It was you?

A Yes, sir.

Q If you can recall, did you discuss your determination to seek the warrant with any superior officer within the department?

A Well, Director Frazier and I had discussed this prior to this.

Q You did discuss it?

A Yes.

Q What did you discuss?

A We discussed the situation out there.

[At page 11]

Q By situation, do you mean the existence of Dallas Notes?

A The pornography and the newspaper in general.

* * *

[At page 12]

* * *

Q In your discussion with Director Frazier, did you reach any policy or any determination as to steps or actions to be taken?

A Yes, he instructed me to take a copy of the Notes to the District Attorney's Office and check with them to see if they would accept the case against this particular issue of the paper.

* * *

[At page 15]

* * *

A I don't know the exact words but the gist of the whole thing was I wanted to know if he would accept a case on this obscene newspaper and he said he didn't see why not. It looks obscene to me—this sort of thing.

Q Did you discuss specific portions of the newspaper?

A Yes. He wanted to look at the whole thing, all of it.

Q Did you direct his attention to any specific portions as obscene?

A Not particularly.

Q Do you know whether Mr. Steinson read it all or just glanced at it?

A He did not read it all.

* * *

[At page 21]

* * *

Q The affidavit and the search warrant were typed and you and Sergeant Monaghan took the affidavit and the search warrant to the hockey game?

A Yes sir.

Q And had Judge Naylor paged?

A Yes, sir.

Q And presented to him the affidavit, is that correct?

A Yes sir.

Q And was the game in progress when you arrived?

A Yes, sir. He came to the door and went with us to a table in the lobby and he authorized it.

Q How much time did you spend with Judge Naylor on that occasion? Do you recall—a minute or two?

A Ten to fifteen minutes, I'm sure.

Q What did you give him in addition to this affidavit, Exhibit Number 1, anything other than that?

A No, sir.

Q You did not present him with a copy of the paper?

A No sir.

* * *

[At page 25]

* * *

Q In fairness then, this was a call from someone unknown to you on the telephone who asserted the facts that you set out in your affidavit about the sale of a newspaper?

A Yes.

Q Did you make any investigation as to the accuracy of the facts before completing the affidavit and presenting it to Judge Naylor?

A The newspaper was picked up at this person's residence by one of our officers but I don't remember who. The newspaper and the note with the name of the person complaining was attached to this copy of the Notes.

* * *

[At page 31]

* * *

Q After having obtained the warrant, where next did you go?

A I think we went directly to 3117 Live Oak Street. We got there—it wasn't much after 9:10. I'd say around 10:00 o'clock when we got there. I am not real sure, but we didn't come back down town. I believe we went directly to Live Oak from the Fair grounds.

* * *

[At page 32]

* * *

Q Who, in addition to these gentlemen, went along on the raid?

A We had a photographer from the Crime Lab. We had two trucks—had several trusties; I don't remember how many.

* * *

[At page 3_]

* * *

[At page 35]

* * *

Q Describe for us generally the premises, physically what is there.

A Well, the house sits on a corner of Skiles and

[At page 36]

Live Oak. it is a two-story house with four—I believe five bedrooms. Downstairs on the left you go through a living room with a fire place. From there you go into the dining room and from there into the kitchen. That is all on the left side.

On the right is a bedroom in the front and another behind it is where I guess the office was—in the back bedroom on the right.

Q The office of what?

A Of the Notes.

Q On the first floor of the house?

A The lower floor.

* * *

[At page 38]

* * *

[At page 39]

* * *

Q What instructions did you give the officers in effecting this search and seizure as to what they

[At page 40]

were to do?

A They were to search for any obscene material they could find. All of our officers know what obscene material is.

Q What is obscene material?

A Well, I wish you hadn't ask that. I take that back. They don't know, neither do I.

Q What instructions had you given them in terms of what they were to do?

A To search for obscene material and seize it.

Q What definition, if any, did you give them as to obscene material?

A I didn't.

* * *

[At page 41]

Q What is your best estimate of the number of newspapers seized on that occasion?

A We guessed two tons.

* * *

[At page 42]

* * *

Q There were newspapers seized that were not the Dallas Notes, too, were there not?

A Yes, sir.

* * *

[At page 46]

* * *

Q You feel that Article 527 does authorize you as a police officer to make on the spot determinations as to the obscenity of given material and to confiscate that material you deem to be obscene, is that correct?

A Yes.

* * *

[At page 47]

* * *

Q On that occasion you seized a photograph enlarger, is that correct?

A Yes, sir.

Q On what basis did you seize and confiscate the photograph enlarger?

A It is my contention that the pictures are obscene and it was used to help put these pictures in the newspapers. It is an implement of the crime.

Q And the same for the camera?

A Yes, sir.

* * *

[At page 51]

* * *

Q Did you make any judgment that evening as to

[At page 52]

whom to arrest or did you arrest everyone there?

A We arrested everyone there.

* * *

[At page 55]

* * *

Q You have indicated that you have read with some care Plaintiff's exhibit number 2 which is the issue of the Notes from the Underground in question. Did you read the portion dealing with the fact that Larry Caroline had been fired by the University of Texas?

A Yes, sir.

Q Did you consider that portion obscene?

[At page 56]

A Not particularly.

Q What about the portion of the paper dealing with police harrassment of an establishment called the Family Circle, did you read that portion of the paper?

A Yes, sir.

Q Did you consider it obscene?

A The article, as a whole?

Q Yes.

A No.

* * *

Q What about the portion "SDS Calls for Student Strike"?

A No, sir.

* * * *

[At page 60]

Q By the way, were you aware at the time you obtained the search warrant and made your search that the pictures that appeared in the Dallas Notes—Plaintiff's exhibit number 2—were publicity stills advertising a movie?

A Other than what I gathered from reading the newspaper, no.

* * *

[At page 62]

* * *

Q (By Mr. Richards) Okay. Would it surprise you and did you know that the movie, "Office Party," from which apparently some of these pictures were taken—"Scarlet Negligee," and "Hot Blooded Woman" were shown and advertised in the Dallas Morning News and shown in the Dallas theaters?

A I am now.

* * *

[At page 74]

Q Are you aware of any communication with Southwestern Bell Telephone?

A After the November 15 raid, yes.

* * *

Q What communication?

A They were notified that we have the telephone in our possession and they could come and pick it up?

* * *

[At page 78]

* * *

Q What do you know about the raid of November 15? Did you participate in it?

A No, sir.

Q Did you authorize it?

A Yes, sir.

* * *

[At page 81]

* * *

Q Did it surprise you when he came back with desks and telephones?

A No sir.

Q That was consistent with your instructions to him?

A When they got in there, I was at home and they called me and told me what they found and I instructed them to get the newspapers and typewriters and all materials used to publish the newspaper.

* * *

[At page 82]

* * *

Q But Sergeant Vaughn sought your instructions and your instructions were to seize exactly everything they seized, is that correct?

A Yes sir.

Q And they cleaned house again?

A Yes, sir.

* * *

PORTION OF DEPOSITION OF VERLAN DEAN MONAGHEN

(The Deposition is not bound with the Record in the case but appears as a separately bound volume. Page Notations below are to the Deposition volume.)

* * *

[At page 3]

* * *

Q Give us your full name, please.

A Burland Dean Monaghen.

Q You are a Sergeant, is that correct?

A Yes, sir.

Q In the Morals Section?

A No, sir. I am in the General Enforcement Section.

* * *

[At page 12]

* * *

Q And called Lieutenant Snider at home?

A Yes, sir.

Q What did you tell him?

A I told him we had been unsuccessful in finding the marijuana at the location. I told him I had run into another issue of the Notes and pornographic pictures there.

Q Did you ask him for instructions and advice?

A Yes, sir.

Q What did he advise you?

A He advised me to confiscate the pornographic literature and any equipment used to make it up.

* * *

[At page 14]

Q Actually one of them was a picture of Mao Tse-Tung?

A What is he? Some kind of a Communist?

Q I guess. If I pronounced it correctly, he is the Premier of China. Did you seize a poster of Mao Tse-Tung?

A I sure did.

Q Did you seize that poster because it was

[At page 15]

pornographic?

A No sir.

Q Why, because it offended you?

A I don't know.

Q Did you seize it because it offended you?

A I didn't know what to seize and what not to seize so I just took everything.

Q There was nothing about the poster that appealed to your prurient interest?

A No, sir.

Q I am curious, frankly. Apparently, there were arrested five people in the raid of 15 November. Does that refresh your memory, looking at the return of the warrant?

A Yes, sir.

Q On what basis were they arrested?

A Well, we didn't know—actually, what we had there and that is the reason I advised them to place them all under arrest. They were all part of producing the paper until investigations could be made.

Q It was their association with the production of the paper that caused them to be arrested?

A That is correct.

• • •

(Filed April 8, 1969)

IN THE

UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF TEXAS

DALLAS DIVISION

CIVIL ACTION NO. 3-2951

BRENT STEIN

vs.

CHARLES BATCHELOR, Chief of Police, City of Dallas; T. C. SNIDER, V. D. MONAGHAN, R. D. RODGERS, and HENRY WADE, District Attorney, Dallas County

(1) Requesting Judge: Honorable SARAH T. HUGHES, Northern District of Texas

(2) District Judge: Honorable HALBERT O. WOODWARD, Northern District of Texas

(3) Circuit Judge: Honorable IRVING L. GOLDBERG

(4) Date of Order: April 3, 1969

The Requesting Judge (1) above named to whom an application for relief has been presented in the above cause having notified me that the action is one required by Act of Congress to be heard and determined by a District Court of three Judges, I, John R. Brown, Chief Judge of the Fifth Circuit, hereby designate the Circuit Judge (3) and District Judge (2) named above

to serve with the Requesting Judge (4) as members of, and with him to constitute the said Court to hear and determine the action.

This designation and composition of the three Judge court is not a prejudgment, express or implied, as to whether this is properly a case for a three Judge rather than a one Judge court. This is a matter best determined by the three Judge Court as this enables a simultaneous appeal to the Court of Appeals and to the Supreme Court without the delay, awkwardness, and administrative insufficiency of a proceeding by way of mandamus from either the Court of Appeals, the Supreme Court, or both, directed against the Chief Judge of the Circuit, the presiding District Judge, or both. The parties will be afforded the opportunity to brief and argue all such questions before the three Judge panel either preliminary or on the trial of the merits, or otherwise, as that Court thinks appropriate. See Jackson v. Choate, 5 Cir., 1968, 404 F.2d 910, [Misc. No. 1071, Nov. 29, 1968], Jackson v. Department of Public Welfare of the State of Florida, S.D. Fla., 1968, F. Supp. ; Smith v. Ladner, S.D. Miss., 1966, 260 F. Supp. 918.

John R. Brown
Chief Judge
Fifth Circuit

(Filed May 28, 1969)

IN THE

UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF TEXAS

DALLAS DIVISION

CIVIL ACTION NO. 3-2951

BRENT STEIN

Plaintiff

vs.

CHARLES BATCHELOR, Chief of Police, City of Dallas; T. C. SNIDER, V. D. MONAGHAN, R. D. RODGERS, and HENRY WADE, District Attorney, Dallas County

Defendants

MOTION TO AMEND

Comes now Plaintiff and moves the Court that he be permitted to amend his pleadings, and that his pleadings be amended, to include in his prayer for relief the following:

> (1) That the Court issue a permanent injunction against the Defendants, their agents, employees and those acting in concert with them, permanently restraining and enjoining them from arresting, presenting for indictment, prosecuting (with the exception of presently pending causes) or otherwise proceeding against the named Plaintiff and the class he represents under Article 527 of the Penal Code of the State of Texas.

(2) A declaratory judgment issue declaring Article 527 to be unconstitutional on its face and as it may be applied to Plaintiff.

In support of its request Plaintiff would show that no prejudice results to any party as a result of the Amendment, and that to allow the amendment would serve the ends of justice. In this connection all parties were advised by letter of April 8, 1969, that Plaintiff intended to seek such an amendment. By permitting the amendment, we thereby eliminate any jurisdictional issue as to the propriety of a three-judge court. For the inclusion of the injunction prayer clearly requires a three-judge court under 28 U.S.C. 2281.

WHEREFORE premises considered Plaintiff respectfully prays that he be granted leave to amend and that his pleadings be deemed amended as aforesaid.

Respectfully submitted,

DAVID R. RICHARDS
205 Texas AFL-CIO Bldg.
308 West 11th Street
Austin, Texas 78701

Attorney for Plaintiff

(Filed June 9, 1969)

IN THE

UNITED STATES DISTRICT COURT FOR THE

NORTHERN DISTRICT OF TEXAS

DALLAS DIVISION

CIVIL ACTION NO. CA 3-2951-B

BRENT STEIN

Plaintiff

vs.

CHARLES BATCHELOR, Chief of Police, City of Dallas; T. C. SNIDER, V. D. MONAGHAN, R. D. RODGERS, and HENRY WADE, District Attorney, Dallas County

Defendants

Before GOLDBERG, Circuit Judge, HUGHES and WOODWARD, District Judges.

HUGHES:

This case involves the constitutionality of Article 527 of the Texas Penal Code, entitled "Acts involving obscene articles, objects, and materials; fines and penalties; exemptions.'" It is a civil rights case brought

---

'Section 1. Whoever shall knowingly photograph, act in, pose for, model for, print, sell, offer for sale, give away, exhibit, televise, publish, or offer to publish, or have in his possession or under his control, or otherwise distribute, make, display, or exhibit any obscene book, magazine, story, pamphlet, paper, writing, card, advertisement, circular, print, pictures, photograph, motion picture film, image, cast, slide, figure, instrument, statue, drawing, phonograph record, me-

chanical recording, or presentation, or other article which is obscene, shall be fined not more than One Thousand Dollars ($1,000) nor imprisoned more than one (1) year in the county jail or both.

Section 2. Whoever shall knowingly offer for sale, sell, give away, exhibit, televise, or otherwise distribute, make, display, or exhibit any obscene book, magazine, story, pamphlet, paper, writing, card, advertisement, circular, print, pictures, photograph, motion picture film, image, cast, slide, figure, instrument, statue, drawing, phonograph record, mechanical recording, or presentation, or other article which is obscene, to a minor shall be fined not more than Two Thousand, Five Hundred Dollars ($2,500.00) nor imprisoned in the county jail more than two (2) years or both.

Section 3. For purposes of this article the word "obscene" is defined as whether to the average person, applying contemporary community standards, the dominant theme of the material taken as a whole appeals to prurient interests. Provided, further, for the purpose of this article, the term "contemporary community standards" shall in no case involve a territory or geographic area less than the State of Texas.

Section 4. Whoever shall be convicted for the second time of a violation of this article shall be deemed guilty of a felony and shall be punished by confinement in the State penitentiary for not more than five (5) years or by a fine of not more than Ten Thousand Dollars ($10,000.00) or by both such fine and imprisonment.

Sec. 5. It shall be a defense to any charges brought hereunder if such prohibited matter or act shall be regularly in use in any bona fide, religious, educational or scientific institution or the subject of a bona fide scientific investigation.

The provisions of this Act shall not apply to any motion pictures produced or manufactured as commercial motion pictures which (1) have the seal under the Production Code of the Motion Picture Association of America, Inc.; or (2) legally move in the interstate commerce under Federal Law; or (3) are legally imported from foreign countries into the United States and have been passed by a Customs Office of the United States Government at any port of entry.

The provisions of this Act shall not apply to any daily or weekly newspaper.

Sec. 6. The district courts of this State and the judges thereof shall have full power, authority, and jurisdiction, upon application by any district or county attorney within their respective jurisdictions, to issue any and all proper restraining orders, temporary and permanent injunctions, and any other writs and processes appropriate to carry out and enforce the provisions of this Act.

under authority of 42 U.S.C. Section 1983 and 1985 by Brent Stein, individually and on behalf of the class similarly situated.

Plaintiff, Stein, is the publisher of an underground by-weekly newspaper, known as the "Dallas Notes." The class which he represents is composed of present and future employees of and contributors to the "Dallas Notes," and persons engaged in the distribution of the "Dallas Notes." The defendants, all of whom are sued in their official capacities, are Henry Wade, District Attorney of Dallas County, Charles Batchelor, Chief of Police, City of Dallas, and three members of the Dallas Police Department.

Plaintiff alleges that the Defendant police have engaged in a deliberate course of treatment designed to harass Plaintiff, for the purpose of suppressing the dissemination of the "Dallas Notes" and the political views expressed therein. They allege further that as a result of two searches of Stein's residence by the police (a portion of the first floor of his residence is used as a work area) there are presently pending against him two misdemeanor cases in the County Criminal Courts of Dallas County, charging him with possession of obscene "paper" and "pictures" in violation of Article 527 of the Texas Penal Code. Plaintiff alleges that he wishes to continue publication of the "Dallas Notes" and fears future arrests and prosecutions under Article 527 unless the rights of the parties thereunder are declared by this Court.

Plaintiff prays (1) for an injunction against Defendants enjoining them from arresting, presenting for indictment, or prosecuting Plaintiff (with the ex-

ception of presently pending causes) under Article 527 of the Penal Code of the State of Texas and (2) for a declaratory judgment declaring Article 527 to be unconstitutional on its face and as applied to Plaintiff. Plaintiff also prays (3) for an injunction against Dallas Police enjoining any arrest of Plaintiff or seizure of his property on the grounds of obscenity without a prior determination of the obscene character of the material in question and requiring the issuance of various instructions to the Police Department.

We find that the prayers for an injunction against any arrest or seizure and for the issuance of instructions is based on the alleged harassment and is not an attack upon the constitutionality of a statute. It is therefore not a subject for a three-judge court.

Therefore, after disposing of the motion for summary judgment this Court will decline to exercise any pendant jurisdiction, which it may have over the remaining claims, and will remand the remainder of the case, for determination by a single District Judge.

Plaintiff, pursuant to Rule 56 of the Federal Rules of Civil Procedure, has filed a motion for partial Summary Judgment praying that Article 527 be declared unconstitutional.

All Defendants have filed Motions to Dismiss, relying primarily upon (1) the federal anti-injunction statute 28 U.S.C. section 2283 (2) the abstention doctrine and (3) the failure to raise a substantial constitutional question.

Plaintiff contends Article 527 is unconstitutional for the following reasons: (1) that is makes mere possession of obscene material a crime; (2) that it is an

overbroad regulation of expression since the definition of obscenity does not require that the material be utterly without redeeming social value; and (3) that it offends the equal protection clause of the fourteenth amendment because Section 5 exempts daily and weekly but not bi-weekly newspapers from the operation of the statute.

An Amicus Curiae filed a brief with the permission of the Court and in addition to the contentions of plaintiff, Amicus Curiae contends that the statute improperly limits the geographical area within which contemporary community standards are to be measured and applied and fails to provide certain procedural safeguards.

Considering first Defendants' contentions in their motion to dismiss we find them without merit. The claim that 28 U.S.C. 2238[2] bars injunctive relief is answered in *Dombrowski v. Phister*, 380 U.S. 479 (1965). The Supreme Court in that case held the statute did not apply to prosecutions that arise after the filing of the complaint in the district court. The Court declared:

> "This statute (2283) and its predecessors do not preclude injunctions against the institution of state court proceedings, but only bar stays of suits already instituted. . . . Since the grand jury was not convened and indictments were not obtained until after the filing of the complaint, which sought interlocutory as well as permanent relief, no state

[2] 28 U.S.C. 2283 provides as follows: "A Court of the United States may not grant an injunction to stay proceedings in a state court except as expressly authorized by Act of Congress or where necessary in aid of its jurisdiction or to protect or effectuate its judgments."

"Proceedings" were pending within the intendment of 2283", *Id.* at 484 n.2.

See also Cameron v. Johnson, S.D. Miss. 1966, 262 F. Supp. 873 and *Landry v. Daly*, N.D. Ill. 1968, 288 F. Supp. 200, 221-224. In the case before us Plaintiff is seeking to enjoin only future prosecutions and the anti-injunction statute does not apply.

The second contention of Defendants that this Court should abstain until the State Courts have had an opportunity to pass on the constitutionality of the statute was likewise considered in *Dombrowski v. Phister, supra.* There Louisiana's Subversive Activities and Communist Control Law was attacked as being unconstitutional. A three-judge court dismissed holding the abstention doctrine applied. The Supreme Court reversed, declaring:

> "We hold the abstention doctrine is inappropriate for cases such as the present one where - - - statutes are justifiably attacked on their face as abridging free expression." p. 489.

We believe that the case before us is similar to *Dombrowski* in its attack on the Texas obscenity statute and that we should not abstain.

As to whether a substantial constitutional question is raised is was held in *Ex parte Boresky*, 290 U.S. 30 (1933) "[t]he existence of a substantial question of constitutionality must be determined by the allegations of the bill of complaint."

With reference to the allegations in the case before us we cite the case of *Phelper v. Decker*, 5th Cir. 1968, 401 F.2d 232. Petitioner in that case had been convicted of possessing obscene material in violation of

Article 527 of the Texas Penal Code. The Circuit Court, while refusing to consider the constitutionality of the Statute because of the failure of petitioner to exhaust state remedies, declared with reference to its constitutionality at page 240

> "Since the Texas Statute is utterly devoid of any language that requires a finding that the material must have no redeeming social value, it may be constitutionally suspect."

In the case before us the constitutionality of the statute is attacked on various grounds which we believe satisfy the requirements of substantiality.

Before discussing the merits of this controversy, we wish to re-emphasize that consideration of the Motion for summary judgment does not in any way involve an appraisal of the constitutionality of the application of Article 527 to Plaintiff. Our sole concern is the determination of whether the statute is constitutionally defective on its face.

Section 1 of Article 527 provides:

> "Whoever shall knowingly photograph, act in, pose for, model for, print, sell, offer for sale, give away, exhibit, televise, publish, or offer to publish, or have in his possession or under his control, or otherwise distribute, make, display, or exhibit any obscene book, magazine, . . . or other article which is obscene . . ."

In view of *Stanley v. Georgia*, — U.S. —, 37 L.W. 4315 (April 7, 1969), the above section is clearly unconstitutional in so far as it makes mere possession of obscene material a crime. A difficult question remains, however, concerning the extent to which Section 1 is affected by *Stanley*. The State points out that the ses-

sion law of which Article 527 is the codification (Chapter 461, Acts 57 Leg. R.S. 1961, Ch. 461, p. 1041), contains a severability clause and argues that only the portion reading "have in his possession or under his control" is affected by the *Stanley* decision. We do not agree.

Although the narrow holding of *Stanley* is simply that "the First and Fourteenth Amendments prohibit making mere private possession of obscene material a crime," we think that the case also stands for a broader proposition. Since *Stanley* involved a direct review of a state conviction for possession of obscene matter, the narrow holding was sufficient to reverse the conviction; thus it was not necessary for the Court to base its decision on a broader ground. It is impossible, however, for this Court to ignore the broader implications of the opinion which appears to reject or significantly modify the proposition stated in *Roth v. United States*, 354 U.S. 476, 485 (1957), that "obscenity is not within the area of constitutionally protected speech or press."

In *Roth* the Supreme Court declared that obscenity is not protected by the First Amendment, whereas non-obscene expression is fully protected, unless excludable because of encroachment upon the limited area of more important interests. The exclusion of obscenity from First Amendment protection was justified on the theory that obscenity is devoid of ideas having even the slightest redeeming social value. The following passages from the *Stanley* opinion appear to modify the dichotomy between protected and unprotected expression by recognizing that at least in some contexts obscenity is afforded First Amendment protection and thus cannot constitutionally be regulated in the absence of a legitimate countervailing societal interest:

> "*Roth* and its progeny certainly do mean that the First and Fourteenth Amendments recognize a valid governmental interest in dealing with the problem of obscenity. But the assertion of that interest cannot, in every context, be insulated from all constitutional protections."
>
> "It is now well established that the Constitution protects the right to receive information and ideas. . . . This right to receive information and ideas, regardless of their social worth . . . is fundamental to our free society. Moreover, in the context of this case—a prosecution for mere possession of printed or filmed matter in the privacy of a person's own home—that right takes on an added dimension. For also fundamental is the right to be free, except in very limited circumstances, from unwanted governmental intrusion into one's privacy."

Stanley expressly holds that obscenity is protected in the context of mere private possession and in our opinion further suggests that obscenity is deprived of this protection only in the context of "public actions taken or intended to be taken with respect to obscene matter."[1]

Of course, the First Amendment does not confer absolute immunity from regulation. The State may regulate even non-obscene expression if there is a legitimate state interest. However, *Stanley* also indicates that in the context of "private" expression here is unlikely to be any legitimate state interest justifying regulation (with the possible exception of the State's interest in protecting children).

---

[1] Indeed, *Stanley* may reasonably be read as supporting the proposition that obscenity is fully protected by the First Amendment, but that the State has a legitimate interest in regulating the public dissemination of ideas inimical to the public morality.

Applying the above discussion of the scope of the *Stanley* decision to the present case, we conclude that Section 1 as a whole is overboard in that it fails to confine its application to a context of public or commercial dissemination. In addition to proscribing the mere possession of obscene material, Section 1 states that "whosoever shall knowingly photograph, act in, pose for . . . print" etc. without any limitation that such activities be engaged in publicly or with the intent to publicly or commercially distribute the materials involved. Although a number of the phrases in their normal and natural usage connote a public activity, this Court is disinclined to separately analyze each phrase appearing in Section 1 to determine if it is constitutionally viable. In our opinion the various provisions of Section 1 are too numerous and interrelated for such an approach to be meaningful. We therefore hold that the whole of Section 1 is unconstitutional for failure to confine its application to a context of public or commercial dissemination.

Next we consider Plaintiff's contention that the absence of any language in the definition of "obscene" requiring that the material be "utterly without redeeming social value" renders Article 527 an impermissibly vague and overboard regulation of expression.

Article 527 defines "obscene" as "whether to the average person applying contemporary community standards, the dominant theme of the material taken as a whole appeals to prurient interests."

This is the definition of obscenity contained in *Roth v. United States*, 354 U.S. 476 (1957). While the Court in *Roth* did not include in its definition, per se, that

material to be obscene must be "utterly without redeeming social value" it quoted the following from *Chaplinsky v. New Hampshire*, 315 U.S. 568, 571-572 (1942):

> ". . . There are certain well-defined and narrowly limited classes of speech, the prevention and punishment of which have never been thought to raise any Constitutional problem. These include the lewd and obscene. . . . It has been well observed that such utterances are no essential part of any exposition of ideas, and are of such slight social value as a step to truth that any benefit that may be derived from them is clearly outweighed by the social interest in order and morality - - - "

In *Jacobellis v. Ohio*, 378 U.S. 184 (1963) the Supreme Court declared at 191 that while the test in *Roth*

> "is not perfect, we think any substitute would raise equally difficult problems and we therefore adhere to that standard".

The Court, however, went on to say:

> "We would reiterate, however, our recognition in *Roth* that obscenity is excluded from the constitutional protection only because it is 'utterly without redeeming social importance' - - - ". *Id.*

While in both *Roth* and *Jacobellis* there is a recognition by the Court that material to be obscene, must be "utterly without redeeming social value" these words are not included in the definition.

In *Memoirs v. Massachusetts*, 383 U.S. 413 (1965), however, the Supreme Court went further when it declared at 418 that in order for material to be obscene:

> "Under this (*Roth*) definition as elaborated in subsequent cases, three elements must coalesce; it

must be established that (a) the dominant theme of the material taken as a whole appeals to a prurient interest in sex; (b) the material is patently offensive because it affronts contemporary community standards relating to the description or representation of sexual matters; and (c) the material is utterly without redeeming social value."

The Fifth Circuit has not passed directly on the question before us but in the case of *Phelper v. Decker* the Court made this comment at p. 40 on the statute before us:

> "Since the Texas Statute is devoid of any language that requires a finding that the material must have no redeeming social value it may be constitutionally suspect."

The definition of "obscene" in Article 527 does not appear to have been construed by the Texas Courts. In this circumstance we must place our own construction on the statute.

It is clear to us that the Supreme Court in *Memoirs* has added to the definition per se, of "obscene" in the *Roth* case by including in it the provision that to be "obscene" material must be "utterly without redeeming social value." Thus without such inclusion the Texas statute is unconstitutional.

As to the Plaintiff's contention concerning contemporary community standard, we assume *arguendo* that national standards are constitutionally required. See *Jacobellis v. Ohio, supra,* at 192-195. This portion of Article 527 apparently has not been construed by the Texas courts. In our opinion Article 527 may reasonably be construed as merely rejecting "local" (i.e. less than state-wide) community standards, and thus is not constitutionally deficient.

Amicus Curiae contends that Article 527 is unconstitutional because it lacks any provision for an adversary hearing on the question of obscenity prior to seizure, citing *inter alia Marcus v. Search Warrant*, 367 U.S. 717 (1961), *Quantity of Books v. Kansas*, 378 U.S. 205 (1964), and *Freedman v. Maryland*, 380 U.S. 51 (1965).

We conclude, however, that the absence of such a provision does not invalidate the statute. None of the cases cited support this proposition. In most of the cases cited the Supreme Court reversed a conviction because the *procedures* involved were inadequate. And in *Freedman v. Maryland* the statute declared unconstitutional was not a penal statute such as Article 527, but a civil statute which required that all films be submitted to a Board of Censors before being shown to the public.

As the State points out, there is at least one procedure whereby Article 527 as written may be constitutionally enforced; police officers can purchase material, and prosecutions can be instituted on the basis of the purchased articles.

If, in fact, constitutionally suspect procedures are followed in enforcing Article 527, then the constitutionality of such procedures can be collaterally attacked in federal court without the necessity of exhausting state remedies. The *Dombrowski* rationale, if not the precise holding itself, would apply to this situation since First Amendment rights may be irretrievably lost by a seizure of Constitutionally protected publications. *See e.g. Poulos v. Rucker*, M.D. Ala. 1968, 288 F. Supp. 305.

We will not pass upon Plaintiff's contention that the exemption of daily and weekly but not bi-weekly newspapers from the operation of Article 527 offends the equal protection clause of the Fourteenth Amendment. Since this ground of attack does not involve an allegation that the statute on its face is repugnant to the First Amendment, *Dombrowski* does not compel us to dispense with abstention and the limitation upon the exercise of federal equity jurisdiction.

In conclusion, Section 1 of Article 527 is impermissibly and unconstitutionally broad. The definition of "obscene" in Section 3 should include a requirement that the material be "utterly without redeeming social value." Plaintiff is entitled to a declaratory judgment to this effect and to injunctive relief against the future enforcement of Sections 1 and 2.

Judgment will be entered in accordance with the declarations and conclusions reached herein.

(Filed June 27, 1969)

IN THE

UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION

CIVIL ACTION NO. 3-2951-B

BRENT STEIN

Plaintiff

vs.

CHARLES BATCHELOR, Chief of Police, City of Dallas; T. C. SNIDER, V. D. MONAGHAN, R. D. RODGERS, and HENRY WADE, District Attorney, Dallas County

Defendants

FINAL JUDGMENT AS TO PART OF PLAINTIFF'S CLAIMS

This action came on for hearing on Plaintiff's Motion for Partial Summary Judgment before a three-judge court composed of the Hon. Sarah T. Hughes, the Hon. Irving Goldberg, and the Hon. H. O. Woodward and the issues having been duly heard and a decision having been duly rendered in an opinion filed with the Clerk on June 9, 1969.

IT IS ORDERED, ADJUDGED AND DECREED:

1. Section 1 of Article 527 of the Texas Penal Code, Acts of 1961 57th Legislature entitled "Acts

involving obscene articles, objects, and materials; fines and penalties; exemption." is hereby declared to be impermissibly broad and unconstitutional.

2. The definition of obscene as set forth in Section 3 of the aforesaid statute is unconstitutional because of failure of that definition to include a requirement that the material be utterly without a redeeming social value.

3. Defendants are permanently enjoined from future enforcement of Sections 1 and 2 of Article 527 of the Texas Penal Code, Acts of 1961, 57th Legislature entitled "Acts involving obscene articles, objects, and materials; fines and penalties; exemptions." as against Plaintiff.

4. All claims and issues not herein determined are reserved for determination by a single judge of this court.

ENTERED this 27 day of June, 1969.

IRVING L. GOLDBERG
Judge, United States Court
of Appeals, Fifth Circuit

SARAH T. HUGHES
Judge, United States
District Court

HALBERT O. WOODWARD
Judge, United States
District Court